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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EASTERN AIR LINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Railway Labor Act limits a carrier's right to use self-help in the face of a crippling strike by prohibiting the carrier from treating newly hired replacements in training as permanent replacements for strikers, where the offers of permanent employment accepted by the replacements were unconditional, and where the carrier could not have recruited sufficient replacements to restore its operations without making such unconditional offers of permanent employment?

STATEMENT OF INTERESTED PERSONS

All parties to this case are named in the caption. Pursuant to Rule 29.1 of the Rules of this Court, petitioner Eastern Air Lines, Inc. ("Eastern") hereby states that its nominal parent company is Continental Airlines Holdings, Inc. ("CAH"). On April 19, 1990, a Chapter 11 Bankruptcy Trustee, Martin R. Shugrue, Jr., was appointed by the United States Bankruptcy Court for the Southern District of New York to manage and control Eastern, replacing CAH (then known as Texas Air Corporation) and its management. *See In re Ionosphere Clubs, Inc.*, 113 Bankr. 164 (Bankr. S.D.N.Y. 1990).

Eastern's only non-wholly owned subsidiary is Bar Harbor Airways, Inc. ("BHA"). Eastern owns 99.5% of BHA's outstanding stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF INTERESTED PERSONS	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. Statement of Facts	3
B. The Decision Below	7
REASONS FOR GRANTING THE WRIT	9
A. The Circuits Are Split On The Important Issue Of Federal Labor Law Raised In This Case	9
1. *National II* And *United* Support Eastern's Position	10
2. The Eighth Circuit's *Trans World* Decision Is Distinguishable And Wrong	13
B. The Eleventh Circuit's Decision Violates The Precepts Set Forth By This Court In Its *Trans World* Decision	15
1. Contrary To This Court's Decision In *Trans World*, The Eleventh Circuit Makes Self-Help More Limited Under The RLA Than The NLRA	15
2. Contrary To This Court's Decision In *Trans World*, The Eleventh Circuit Implies A New Limitation On The RLA Right Of Self-Help	18

Table of Contents Continued

Page

C The Eleventh Circuit's Decision Destroys An Airline's Right Under *Mackay* To Continue Operating During A Pilot Strike By Hiring Permanent Replacements 21

D. The Eleventh Circuit's Decision Ignores The Hiring Needs Of Airlines Attempting To Fulfill Their Statutory Obligation To Operate During Pilot Strikes 22

CONCLUSION 23

APPENDICES

Appendix A, Opinion of the Court of Appeals (December 20, 1990) 1a

Appendix B, Order of the District Court (August 2, 1990) 20a

Appendix C, Order of the Court of Appeals on Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc (March 15, 1991) 31a

Appendix D, Judgment of the Court of Appeals (Issued as Mandate, March 26, 1991) 33a

Appendix E, Declaration of Alan C. Gibson (attachments omitted) 35a

Appendix F, Declaration of Karen Averill (attachments omitted) 55a

Appendix G, Railway Labor Act Provisions 60a

TABLE OF AUTHORITIES

Page

Cases

Air Line Pilots Ass'n, Int'l v. Eastern Air Lines, Inc., 863 F.2d 891 (D.C. Cir. 1988), *reh'g en banc denied*, 863 F.2d 913 (D.C. Cir. 1989) ... 21

Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) 12,13

Air Line Pilots Ass'n Int'l v. United Air Lines, Inc., 616 F. Supp. 849 (N.D. Ill.), *amending*, 614 F. Supp. 1020 (N.D. Ill. 1985), *rev'd in part on other grounds*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) 3,9,12,20

Anderson, Clayton & Co., 120 N.L.R.B. 1208 (1958) 16,20

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) ... 11,14,17,22

Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369 (1969) 15

Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry., 384 U.S. 238 (1966) 23

Burlington Northern R. Co. v. Maintenance of Way Employees, 481 U.S. 429 (1987) 15

Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 710 F. Supp 1342 (S.D. Fla.), *aff'd*, No. 89-5229 (11th Cir. June 7, 1989) 18,19

Home Insulation Services, 255 N.L.R.B. 311 (1981), *enforced*, 665 F.2d 352 (11th Cir. 1982) 20

Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964) 15

In re Ionosphere Clubs, Inc., 113 Bankr. 164 (Bankr. S.D.N.Y. 1990) ii

In re Ionosphere Clubs, Inc., 922 F.2d 984 (2d Cir. 1990) 22

Table of Authorities Continued

Page

International Ass'n of Machinists, Lodge 1652 v. International Aircraft Services, Inc., 302 F.2d 808 (4th Cir. 1962) 10

Kurz-Kasch, Inc., 286 N.L.R.B. 1343 (1987), *remanded on other grounds*, 865 F.2d 757 (6th Cir. 1989) 20

Missouri v. Jenkins, ___ U.S. ___, 110 S. Ct. 1651 (1990) 2

National Airlines, Inc. v. International Ass'n of Machinists & Aerospace Workers, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ..... *passim*

Newberry Energy Corp., 227 N.L.R.B. 436 (1976) 15

NLRB v. Cutting, Inc., 701 F.2d 659 (7th Cir. 1983) 8

NLRB v. Erie Resistor, 373 U.S. 221 (1963) 8,9,22

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) ..... *passim*

NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) ..... *passim*

Solar Turbines, Inc., 302 N.L.R.B. No. 3, slip op. (March 11, 1991) 16,17,18,20

Southwest Engraving Co., 198 N.L.R.B. 694 (1972) 20

Trans World Airlines v. Independent Fed'n of Flight Attendants, 489 U.S. 426 (1989) ..... *passim*

Trans World Airlines v. Independent Fed'n of Flight Attendants, 818 F.2d 839 (8th Cir. 1987), *rev'd in part on other grounds*, 489 U.S. 426 (1989) 13,14

Table of Authorities Continued

Page

Statutes

Judiciary and Judicial Procedure, 62 Stat 928, 28 U.S.C. § 1254(1) 2

Federal Question Jurisdictional Amendments Act of 1980, 94 Stat. 2369, 28 U.S.C. § 1331 8

District and Circuit Judges - Appointments, 92 Stat. 1629, 28 U.S.C. § 1337(a) 8

National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151 *et seq.* 15,18

Railway Labor Act, 44 Stat. 577, 49 Stat. 1189 (as amended), 45 U.S.C. § 151 *et seq.* ..... *passim*

45 U.S.C. § 151, Fifth 7

45 U.S.C. § 151a 19

45 U.S.C. § 181 7

Regulations and Rules

14 C.F.R. Part 67 12

14 C.F.R. Part 108 12

14 C.F.R. Part 121 12

Eleventh Circuit Rule 35-6 2

Supreme Court Rule 29.1 ii

Other

Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 Lab. Lawyer 137 (1991) 14

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Eastern Air Lines, Inc. ("Eastern") respectfully seeks review of the decision of a split panel of the Eleventh Circuit holding that Eastern could not treat new hire pilots as permanent replacements for strikers before the new hires completed Eastern's training. The decision ignores uncontradicted evidence that Eastern was only able to recruit a sufficient number of replacement pilots to continue flying during the strike by offering them permanent employment from their first day of training. Unless this Court reviews the decision, Eastern's bankrupt estate will face tens of millions of dollars in claims for back-pay from strikers, and airlines will effectively lose their right to hire permanent replacements for striking pilots.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 920 F.2d 722 and is reprinted at pages 1a to 19a of the Appendix ("App."). The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing in banc is not yet reported, but is reprinted at App. 31a to 32a. The Eleventh Circuit's mandate is reprinted at App. 33a to 34a. The order of the United States District Court for the Southern District of Florida, which Eastern appealed, is reported at 744 F. Supp. 1140 and is reprinted at App. 20a to 30a.

JURISDICTION

The opinion and judgment of the Eleventh Circuit were entered on December 20, 1990. App. 1a, 34a. Eastern's Petition for Rehearing and Suggestion of Rehearing In Banc was denied on March 15, 1991.[1] App. 31a-32a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* The provisions of the RLA

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[1] Pursuant to Eleventh Circuit Rule 35-6, Eastern's pleading, which was entitled "Suggestion of Rehearing In Banc," was also treated as a Petition for Rehearing. *See* Eleventh Cir. R. 35-6 ("A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel."); App. 32a ("The Petition(s) for Rehearing are DENIED. . .the Suggestion(s) of Rehearing En Banc are DENIED."). Thus, this Petition for Writ of Certiorari is timely filed within 90 days of the Eleventh Circuit's order denying rehearing and rehearing in banc. *See Missouri v. Jenkins*, ___ U.S. ___, 110 S. Ct. 1651, 1662 (1990) (noting Eleventh Cir. R. 35-6).

relied upon by the Eleventh Circuit are reprinted at App. 60a to 61a.

STATEMENT OF THE CASE

The Eleventh Circuit's decision will imperil airlines during future strikes. As the record here shows, pilots will not leave their jobs to join a carrier as replacements for strikers contingent on completing several weeks of federally-required training before the strike ends, whenever that may be. The decision eviscerates the airlines' right under *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) ("*Mackay*") to operate during strikes with permanent replacements, conflicts with decisions in other circuits,[2] and implies a new limitation on self-help under the RLA contrary to this Court's decision in *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 442 (1989) ("*Trans World*").

A. Statement of Facts

On March 4, 1989, the Air Line Pilots Association, International ("ALPA") launched what it termed a sympathy strike against Eastern, and only 6% of Eastern's pilots reported for work. App. 37a. As a result, Eastern canceled all but a small portion of its flights and filed for bankruptcy five days later. App. 37a-38a. After Eastern attempted to persuade the strikers to return to work and sought an injunction

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[2] *National Airlines, Inc. v. International Ass'n of Machinists & Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ("*National II*"); *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.*, 616 F. Supp. 849 (N.D. Ill.), *amending*, 614 F. Supp. 1020 (N.D. Ill. 1985), *rev'd in part on other grounds*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) ("*United*").

against the strike, Eastern began, as a last resort, recruiting experienced replacement pilots on March 21, 1989. App. 38a, 46a.

For the first several days, Eastern departed from its longstanding practice of treating new hire pilots immediately as permanent employees and told recruits that they would not be permanent employees until they completed training. App. 47a n.31, 57a. Because it soon became clear that Eastern could not attract enough recruits on those terms, Eastern stated on March 27, 1989 and thereafter in recruiting materials and employment offers that Eastern would employ new hire pilots as permanent replacements and that they would be guaranteed permanent pilot positions if they accepted Eastern's offer of employment. *See* App. 49a, 57a-58a.

Eastern hired 1,223 replacement pilots during the strike; the replacements held airline transport or commercial pilot licenses and averaged 5,700 hours of flight experience with smaller carriers. App. 37a, 40a n.20, 52a. The uncontradicted evidence is that Eastern would have been unable to attract sufficient qualified replacement pilots to operate without promising them permanent employment from their first day of training.[3] App. 49a-50a, 52a-53a, 58a.

Eastern treated the replacements at issue identically to all other Eastern pilots hired during the 25 years preceding ALPA's strike. *See* 43a-46a. As of

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[3] Eastern submitted to the District Court over 70 declarations from replacement pilots stating specifically that they would not have left their prior jobs to join Eastern unless they were treated as permanent replacements from the first day of training. ALPA did not submit any evidence contradicting these declarations.

their first day of training, the replacements came on Eastern's payroll, received Eastern seniority numbers and Eastern dates of hire, had all applicable employment taxes paid, and began active "service" under the Eastern-ALPA collective bargaining agreement used to calculate vacation, sick leave, pension and other benefits. *Id.*

A small number of Eastern pilots initially crossed ALPA's picket line. App. 36a, 37a. Thereafter, Eastern's pilot positions were also filled by returning strikers and replacements. *Id.* Both the returning strikers and replacements had to complete training or retraining required by the Federal Aviation Administration ("FAA"), under Eastern's supervision and control. App. 39a, 40a-42a, 53a-54a. Eastern assigned replacements to specific positions and aircraft, and trained them in a program that lasted for at least eight weeks—a longer period than normal because Eastern's limited training facilities were fully taxed due to the need to train such a large number of pilots. App. 40a-41a.

As Eastern's efforts to recruit and train replacements became more successful in the summer of 1989, and as Eastern was beginning to restore its scheduled service, the solidarity of the striking pilots began to wane. *See* App. 38a-39a. In early August 1989, several hundred strikers offered to return to work. App. 39a. Eastern immediately brought these pilots back to work and retrained them ahead of replacements who were awaiting training. App. 39a-40a. On August 11, 1989, Eastern determined that it had enough pilots (replacements and returning strikers) to restore its full operations. *See* App. 3a, 39a. Thus, on that day,

Eastern immediately stopped hiring replacements and announced that no positions were available to any additional strikers seeking to return to work, but that they would be recalled as positions became available in the order in which they offered to return to work. *Id.*

ALPA's strike continued for three more months, finally ending on November 22, 1989, when ALPA offered, on behalf of the remaining strikers, to return to work. *Id.* Because Eastern had accelerated the retraining of returning strikers, approximately 227 replacement pilots were still in training when ALPA's strike ended. App. 3a, 39a. The Eleventh Circuit's decision holds Eastern liable for not laying off the 227 replacements to create vacancies for the strikers to fill, although Eastern previously guaranteed permanent employment to the replacements.[4] App. 3a, 18a.

If Eastern had laid off the 227 replacements, each returning striker would have had to complete up to 30 days of retraining, including full upgrade and transition training for new positions, because the replacements did not hold the same positions that the senior strikers vacated. App. 53a-54a. This retraining would have taken several months, and Eastern would have

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[4] The Eleventh Circuit's decision goes even further. Aside from the 227 replacements, other replacements had not completed their initial operating experience ("IOE"), which consists of 10-25 hours of flying on regular revenue flights after a pilot finishes all ground and flight training. *See* App. 42a n.25. The Eleventh Circuit also found that IOE was part of Eastern's training program and effectively holds Eastern liable for declining to lay off the replacements who had not completed IOE by the strike's end. *See* App. 12a n.5.

had to cancel hundreds of flights in the meantime for two reasons. App. 54a. First, the strikers could not have completed their required retraining in time to staff Eastern's scheduled flights. *Id.* Second, replacements would have quit because of their impending furlough. *Id.*

B. The Decision Below

The Eleventh Circuit's two-to-one decision establishes a new *per se* rule: new hire pilots who do not complete training before a strike ends are not permanent replacements, even if, as here, they accepted permanent employment, specific job assignments and pay. App. 1a-2a, 12a-15a. The decision does not address Eastern's legitimate and substantial business justification that Eastern was only able to continue operating during the strike by offering recruits permanent employment from the outset of training.

Rather, the decision finds that a new hire pilot does not meet the RLA's definition of "employee" before completing training[5] and, therefore, a new hire pilot is not a permanent replacement until after he or she

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[5] The RLA defines "employee" as:

> "[E]very person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect. . . ."

45 U.S.C. § 151, Fifth. The RLA specifically covers "every air pilot or other person who performs any work as an employee or subordinate official of [a] carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service." 45 U.S.C. § 181.

completes training. App. 9a-10a, 14a. The Eleventh Circuit avoids the offer and acceptance test used by the Fifth Circuit in *National II* for determining whether an airline may treat a new hire as a permanent replacement. App. 15a-17a. The decision holds that because Eastern's replacements in training were not "employees" under the RLA, Eastern should have laid them off when the strike ended to create vacancies for strikers. App. 14a, 17a.

Accordingly, the Eleventh Circuit affirmed the District Court, which pursuant to its jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and the RLA granted ALPA's motions for summary judgment on its claims on behalf of the strikers for damages and for a preliminary injunction. App. 19a, 29a. The Eleventh Circuit remanded to the District Court the subsidiary question of the precise number of strikers that Eastern should have reinstated. App. 18-19a.

The Eleventh Circuit reached this result even though an airline's right to hire permanent replacements does not stem from the RLA's provisions governing employment in general, but rather comes from an employer's inherent right to continue its business during a strike. *See Mackay*, 304 U.S. at 345. *See also NLRB v. Cutting, Inc.*, 701 F.2d 659, 662 (7th Cir. 1983). The decision considers only whether the replacements in training were "employees" within the meaning of the RLA to decide if they actually occupied the strikers' jobs before the strike ended, under *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).[6] App. 6a-7a, 12a-15a.

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[6] The Eleventh Circuit's decision also relies on dicta in *NLRB v. Erie Resistor*, 373 U.S. 221, 232 (1963). *See* App. 7a. *Erie*

The Eleventh Circuit's decision ignores *Fleetwood Trailer*'s statement that the occupying of strikers' jobs by replacements is merely *one* legitimate and substantial business justification that supports an employer's refusal to reinstate strikers.[7] Thus, the decision does not consider the sufficiency of Eastern's justification that Eastern had to offer replacements permanent employment from the first day of training to attract enough replacements to avoid shutting down during the strike.

REASONS FOR GRANTING THE WRIT

A. The Circuits Are Split On The Important Issue Of Federal Labor Law Raised In This Case

The Eleventh Circuit's decision conflicts with *National II* (Fifth Circuit) and *United* (the Northern District of Illinois). This Court should resolve this conflict so that employers and unions can negotiate and operate in full knowledge of the law concerning striker replacements.

Resistor involved an employer's grant of super-seniority to crossovers and replacements. By contrast, Eastern did not disturb its seniority list. Returning strikers maintained their seniority and did not lose accrued seniority during the strike. The employer in *Erie Resistor* was found to have acted in a manner that was inherently destructive of union membership based upon detailed factual findings not made here.

[7] *Fleetwood Trailer* states:

> "In some situations, 'legitimate and substantial business justifications' for refusing to reinstate striking employees who engaged in an economic strike, have been recognized. One is when jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations."

389 U.S. at 379.

1. *National II* And *United* Support Eastern's Position

In *National II*, the Fifth Circuit established a two-step test to determine whether 67 replacements were permanent replacements by the strike's end. 430 F.2d at 961. First, in deciding when a replacement is hired:

> "[T]he critical time is when the arrangements with the replacement worker have become fixed and irrevocable. Thus, if the employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is 'hired' even though subsequently he may be divested of his job for failure to pass medical or security clearance."

Id. (citation omitted). Second, the replacement must thereafter "actually com[e] on the payroll." *Id.*

Eastern's replacements met this test. Before the strike ended, they accepted offers of permanent employment and specific job assignments, and they had come on Eastern's payroll.

The Eleventh Circuit majority dismisses these facts by declaring that replacements in training did not have "fixed and irrevocable" employment.[8] App. 16a.

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[8] In adopting the "fixed and irrevocable" language, the Fifth Circuit in *National II* was following the Fourth Circuit in *International Ass'n of Machinists, Lodge 1652 v. International Aircraft Services, Inc.*, 302 F.2d 808, 812 (4th Cir. 1962) ("*IAM*"). *See National II*, 430 F.2d at 961. In *IAM*, the Fourth Circuit held that if the employer "bound itself irrevocably by contracts of employment made with replacement employees some time before they went to work," the replacements were hired before the strike ended. 302 F.2d at 812. The Fourth Circuit directed the district court to "ascertain when the new employees had

Their employment was, however, "fixed and irrevocable" as defined in *National II* (acceptance of permanent employment and a specific job assignment) and under state contract law. *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) ("*Belknap*").

The decision also attempts to distinguish *National II* on two other grounds, each of which is unavailing. First, the decision notes that *National II* did not involve replacements who had to pass a training program. App. 16a. But, *National II* did involve 63 replacements who had not even reported to the airline, a far cry from Eastern's replacements who had all begun training on Eastern's payroll before ALPA's strike ended.[9] Just because this case involved pilots (for whom training is required) while *National II* involved mechanics is no reason to reject *National II*'s binding offer and acceptance test.

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payroll status and what, if any, enforceable legal obligations the company incurred in its arrangements with them." *Id.* at 813. Eastern's replacements in training clearly met the Fourth Circuit's test, having accepted firm offers of permanent employment and acquired payroll status before ALPA's strike ended.

[9] Accordingly, even though National's replacements were "not actually performing the work ordinarily discharged by the former strikers" (App. 13a), *National II* held that they were permanent replacements if they had accepted permanent employment and specific job assignments, and came on National's payroll. Thus, a factor critical to the Eleventh Circuit majority (App. 13a) is irrelevant under *National II*. The Eleventh Circuit's decision also overemphasizes pilot training in singling out the replacements as "unqualified." Neither the replacements *nor* the strikers were immediately "qualified to perform the work Eastern's pilots ordinarily discharged." App. 12a. Eastern's operations would have been curtailed and disrupted while strikers completed retraining. *See* App. 54a.

Second, the decision labels medical and security clearance as mere "technicalities" as compared to training. App. 16a. There is no basis in law or the record for this "distinction" as Circuit Judge Anderson pointed out in his dissent; all three are requirements that pilots must fulfill after they accept permanent employment.[10] App. 19a. Eastern's new hires were permanent replacements when they met *National II*'s standard, without regard to whether they had satisfied training, medical, or security clearance requirements.

United also supports Eastern here. In *United*, Judge Bua of the Northern District of Illinois held that 539 United new hire pilots who accepted offers of permanent employment, including 114 new hires who did not even begin training during the strike, were permanent replacements. 616 F. Supp. at 851 ("Permanent replacements hired from outside the company, unlike striking pilots who cross over, need not actually begin working in order to retain their jobs following the conclusion of a strike."). *A fortiori*, Eastern's new hires, who all began training during the strike, were permanent replacements. The Eleventh Circuit's decision does not even address the significant *United* district court decision.[11]

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[10] For instance, the FAA regulates pilot training, medical clearance, and airline security. 14 C.F.R. Parts 121, 67, 108.

[11] The Seventh Circuit reversed a prior decision in the same case on a different issue. *See Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). The Seventh Circuit held that a different group of 500 new hires (the "Group of 500") who did *not* accept offers of permanent employment and, with a few exceptions, never came to work were not "employees" within the RLA's

2. The Eighth Circuit's *Trans World* Decision Is Distinguishable And Wrong

The Eleventh Circuit followed the Eighth Circuit's *Trans World* decision, 819 F.2d 839 (8th Cir. 1987) *rev'd in part on other grounds*, 489 U.S. 426 (1989). App. 10a-11a, 12a.[12] That decision, which involved TWA's hiring of replacement flight attendants during a strike, is inapposite. TWA never offered employment to flight attendants before they completed training (for which they paid tuition) except *after* the strike began. 819 F.2d at 841 n.2. By contrast, Eastern treated the replacements at issue exactly as it treated all new hire pilots for the 25 years *before* ALPA's strike began.

The Eighth Circuit's decision is wrong because it confuses whether an airline may refuse to lay off new hires because the airline, out of necessity, offered them permanent employment, with the separate and distinct question of whether new hires qualify as RLA "employees" to assert claims under the RLA against their employer. An airline seeking to operate during

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definition, and ALPA could not succeed on a claim on behalf of the Group of 500 against United for violating the RLA. 802 F.2d at 892-93. The Group of 500 would not have been permanent replacements under *National II* or under Judge Bua's subsequent decision in any event; they received only expense reimbursements rather than salary and signed agreements providing that they would not be employees during training. The Group of 500 were very different from Eastern's replacements and United's 539 other new hires.

[12] The Eleventh Circuit also relied on the Seventh Circuit's *United* decision (App. 11a, 12a), which held that ALPA could not assert RLA claims on behalf of the Group of 500, who had expressly agreed that they were not permanent employees during training. That decision is plainly inapposite. *See* n. 11, *supra*.

a strike, as it is entitled to do under *Mackay*, must recruit and hire replacements without knowing when the strike will end. *See* Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 Lab. Lawyer 137, 146 (1991) ("The *Mackay* doctrine allows each side to a bargaining dispute, in effect, to 'test the market' by seeking and using alternative sources of labor and employment, respectively."). Eastern's offers of permanent employment to potential new hires were wholly necessary in that context.

RLA "employee" status is very different. It does not depend upon or arise *ipso facto* from a strike. Because Eastern voluntarily extended the terms of its collective bargaining agreement to the new hires (creating obligations under state contract law as established in *Belknap*), it was academic whether the new hires could someday assert claims as RLA "employees."[13] Indeed, under *National II*, permanent replacements acquire that status when hired, before they are "employees" under any definition, statutory or otherwise. This Court should grant this Petition and reject the Eighth Circuit's analysis in *Trans World*, which focuses on an irrelevant and esoteric question.

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[13] In fact, the Eleventh Circuit's answer to this irrelevant question was itself wrong because Eastern's replacements in training were subject to Eastern's supervision and control, and required attendance in training does constitute work. *See* App. 41a. Indeed, during IOE (which is training according to the Eleventh Circuit), new hires piloted Eastern revenue flights. *See* App. 42a, 12a-13a.

B. The Eleventh Circuit's Decision Violates The Precepts Set Forth By This Court In Its *Trans World* Decision

The Eleventh Circuit's decision conflicts with this Court's decision in *Trans World* both by substantially narrowing the RLA right of self-help and in doing so by implying a new limitation on that right.

1. Contrary To This Court's Decision In *Trans World*, The Eleventh Circuit Makes Self-Help More Limited Under The RLA Than The NLRA

This Court reiterated in *Trans World* the fundamental principle that the RLA "provide[s] greater avenues of self-help" than the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* *Trans World*, 489 U.S. at 438 (*citing Burlington Northern R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 444 (1987); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 391-92 (1969)). The Eleventh Circuit's decision vitiates this Supreme Court doctrine. The decision makes the right of RLA employers to hire permanent replacements during a strike much *narrower* than the corresponding NLRA right. Numerous cases decided under the NLRA hold, contrary to the Eleventh Circuit's decision here, that new hires become permanent replacements when hired, without regard to their need for training or their beginning work after the strike ended.[14]

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[14] *E.g.*, *Newberry Energy Corp.*, 227 N.L.R.B. 436, 437 (1976) ("The Board has uniformly held that where an employer makes a commitment to an applicant for a striker's job it will normally regard that commitment as a legitimate replacement even though the striker requests reinstatement before the replacement actually begins to work.") (footnote omitted); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 804 (1964) ("And under established Board

Recently, the National Labor Relations Board ("NLRB") reaffirmed this holding and rejected the Eleventh Circuit's view in *Solar Turbines, Inc.*, 302 N.L.R.B. No. 3, slip op. (March 11, 1991) ("*Solar Turbines*"). The NLRB ruled that 39 new hires who had not taken (much less, passed) a preemployment drug and alcohol test or begun work before the strike ended were permanent replacements for strikers because of the employer's "clear commitment to hire them as permanent replacements." *Id.* at 5. *Solar Turbines* holds that replacements fill strikers' jobs "as of the time the putative replacements accept an employer's offers of permanent employment in the strikers' jobs," even if the replacements actually began work after the strike ended. *Id.* at 3. By contrast, the Eleventh Circuit disregarded Eastern's clear commitment to the new hires that Eastern would hire them as permanent replacements and held that East-

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precedent the fact that replacements lacked experience and required some training, and that some did not remain permanently in Respondent's employ, does not detract from Respondent's intent at the time of hiring that the replacement become the permanent replacements of the strikers. Accordingly, we find that Respondent intended to, and did in fact, hire permanent replacements for the strikers.") (footnote omitted); *Anderson, Clayton & Co.*, 120 N.L.R.B. 1208, 1214 (1958) ("The replacements admittedly were totally inexperienced and without known aptitudes or fitness for the jobs to which they had been assigned, jobs which require training estimated at 1 to 4 months or so .... Despite all these matters, ... and the fact that six of the so-called permanent replacements had only received their assignment to these positions prior to the conclusion of the strike and entered upon their duties only after the conclusion of the strike ... the employer had the right during the pendency of the strike to assign anyone it cared to work permanently on these jobs and that such assignments must be considered as permanent replacements.").

ern's new hires did *not* fill the strikers' jobs as of the time the new hires accepted Eastern's offers of permanent employment. App. 14a-15a.

In addition, *Solar Turbines* rejects the Eleventh Circuit's focus on whether new hires met the statutory definition of "employee" to decide whether an employer hired permanent replacements before the strike ended.[15] The NLRB finds that irrespective of whether the new hires were statutory "employees" before the strike ended for purposes of collective bargaining, the employer could treat the new hires as permanent replacements for strikers if the employer hired them on that basis:

> "The question before us here is not whether the Respondent was required to bargain with the Union before administering the drug and alcohol tests to the putative replacements. Rather, the question is whether the hiring commitment made to *prospective* employees was sufficient to effect the permanent replacement of strikers."

Id. at 4 n.3 (emphasis added).

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[15] The NLRB relied on this Court's decision in *Belknap*, which states as follows:

> "That the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional."

463 U.S. at 504 n.8, (*quoted* in *Solar Turbines*, slip op. at 6). Thus, even though Eastern's new hires had to complete training to fly for Eastern, they were still permanent replacements both under *Belknap* and *Solar Turbines*, contrary to the Eleventh Circuit's view.

Eastern's new hire pilots at issue here were permanent replacements under *Solar Turbines*' analysis, even though that decision was issued in an NLRA case. Thus, the Eleventh Circuit's decision violates the fundamental principle reiterated by this Court in *Trans World*. The Eleventh Circuit substantially narrowed the RLA right to hire permanent replacements as compared to the right as construed in NLRA cases such as *Solar Turbines*, and the hiring of permanent replacements is a critical component of an employer's right under either statute to use self-help. The Eleventh Circuit's result is backwards; this Court held in *Trans World* that the RLA permits greater, not lesser, avenues of self-help as compared to the NLRA.

2. Contrary To This Court's Decision In *Trans World*, The Eleventh Circuit Implies A New Limitation On The RLA Right Of Self-Help

The Eleventh Circuit's decision also conflicts with *Trans World*'s admonition not to imply new limitations on the RLA right of self-help. In *Trans World*, this Court stated:

> "[W]e should hesitate to imply limitations on all but those forms of [RLA] self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself."

489 U.S. at 442.[16]

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[16] Unlike the more typical situation involving the use of RLA self-help, Eastern and ALPA had not exhausted the RLA's bargaining processes when ALPA began its strike. ALPA claimed that it went on strike in sympathy with the International Association of Machinists' strike against Eastern, which also began on March 4, 1989. *See Eastern Air Lines, Inc. v. Air Line Pilots*

The Eleventh Circuit's decision implies a new limitation on RLA carriers' use of self-help by severely constraining airlines' ability to recruit replacement pilots, even though the RLA does not impose any such constraint. The Eleventh Circuit's decision justifies this result by finding conclusorily that "Eastern's treatment of the returning pilots strikes a fundamental blow to the union and collective bargaining process." App. 18a. The decision goes so far as to find that Eastern did not promote a purpose of the RLA set forth in 45 U.S.C. § 151a by not "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein." App. 17a.

The facts are to the contrary. Eastern treated the returning strikers and the replacements precisely the same. Eastern deemed them all permanent employees from their first day of training. This treatment did not strike a fundamental blow to ALPA in the 25 years preceding the strike. Moreover, Eastern did not abuse its *Mackay* right during ALPA's strike. Eastern stopped hiring replacements as soon as Eastern satisfied its need for additional pilots, three months before the strike ended. App. 3a, 39a. *Cf. Fleetwood Trailer*, 389 U.S. at 379 (alleged replacements *hired two months after* strike ended). Indeed, were it not for Eastern's promise to recruits that Eastern would treat them as permanent employees from the first day of training, Eastern would not have had sufficient

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Ass'n, Int'l, 710 F. Supp. 1342 (S.D. Fla.), *aff'd*, No. 89-5229 (11th Cir. June 7, 1989). From a carrier's standpoint, the need for self-help is the same whether it faces a primary strike or a sympathy strike: "to carry on the business." *Mackay*, 304 U.S. at 345.

replacement pilots to fly its full schedule. App. 49a-50a, 52a, 58a.

The law is also to the contrary. Other employers, including United Air Lines and National Airlines, lawfully declined to reinstate strikers because their positions were filled by replacements who had not completed training or otherwise not begun work when the strike ended, provided that the replacements had accepted offers of permanent employment by then. *National II*, 430 F.2d at 961 (63 replacements not even on National's premises at strike's end); *United*, 616 F. Supp. at 851 (114 replacements had not begun training by strike's end). *See also Solar Turbines*, slip op. at 5-7 (replacements had merely been assigned job classifications, work departments and employee badge numbers before strike ended); *Kurz-Kasch, Inc.*, 286 N.L.R.B. 1343, 1360 (1987), *remanded on other grounds*, 865 F.2d 757 (6th Cir. 1989) (replacements started work *one month after* strike ended because employer could not train them earlier); *Home Insulation Services*, 255 N.L.R.B. 311, 312 n.9 (1981), *enforced*, 665 F.2d 352 (11th Cir. 1982) (rejecting argument that replacements who accepted permanent employment, but did not report to work before strike ended were not permanent replacements); *Southwest Engraving Co.*, 198 N.L.R.B. 694, 695 (1972) (replacement began work *two months after* strike ended); *Anderson, Clayton & Co.*, 120 N.L.R.B. at 1214 (replacements merely received assignments before strike ended, needed *one to four months* of training, and began work after strike ended).

This Court should review the Eleventh Circuit's decision because it is at odds with this Court's decision in *Trans World*.

C. The Eleventh Circuit's Decision Destroys An Airline's Right Under *Mackay* To Continue Operating During A Pilot Strike By Hiring Permanent Replacements

If the Eleventh Circuit's decision remains intact, airlines will be unable to use their *Mackay* right during future pilot strikes for at least two reasons. First, the record here shows that pilot recruits will not leave their existing jobs to become replacements subject to layoff if they do not complete several weeks of training before the strike ends. *See* App. 49a-50a, 52a, 58a. Because potential replacements do not know when a strike might end, the decision creates an untenable risk in the eyes of recruits that airlines may have to layoff replacements.

Under the Eleventh Circuit's decision, an airline can only hire replacements who are temporary, not permanent, at least until they complete training. This radical change will make it much harder for airlines to recruit replacements, as Eastern's experience proves. Airlines will not have enough replacements to operate during strikes, and the travelling public will suffer as a result.[17]

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[17] ALPA speculated below that Eastern could have emulated United with the Group of 500 and pre-trained an entire work force of replacements before the strike began. Eastern, a carrier in financial extremis, certainly could not have afforded to maintain two pilot work forces. *See Air Line Pilots Ass'n, Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891 (D.C. Cir. 1988), *reh'g en banc denied*, 863 F.2d 913 (D.C. Cir. 1989) (Eastern lost $1 billion from 1980 to 1988). The pre-training of an entire body of replacements is also much more draconian than Eastern's conduct, which enabled hundreds of strikers to return to work. ALPA also suggested disingenuously that Eastern could have

Second, even if an airline could recruit new hires on contingent terms, the union could easily oust them. The union need only dribble strikers back to work equal in number to each class of new hires as it completes training and prepares to embark on IOE. The airline could not operate while the cross-overs completed retraining, and the bulk of the strikers could stay out indefinitely without any risk of being permanently replaced.

This Court has repeatedly reaffirmed *Mackay*. *Trans World*, 489 U.S. at 433; *Belknap*, 463 U.S. at 504 n.8; *Fleetwood Trailer*, 389 U.S. at 379; *Erie Resistor*, 373 U.S. at 221. This Court should review the Eleventh Circuit's decision to prevent *Mackay* from becoming a nullity during future airline strikes.

D. The Eleventh Circuit's Decision Ignores The Hiring Needs Of Airlines Attempting To Fulfill Their Statutory Obligation To Operate During Pilot Strikes

The uncontradicted evidence before the Eleventh Circuit was that Eastern could not recruit enough replacement pilots to operate during ALPA's strike by offering them employment contingent on their completion of training. *See* App. 49a-50a, 58a. Nevertheless, the Eleventh Circuit held that the very employment terms that Eastern tried and found inadequate to attract replacements are the only terms that Eastern could have lawfully used.

As even the Eleventh Circuit concedes in conclusory fashion, the law is that strikers need not be reinstated if an employer has a legitimate and substantial busi-

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entered into additional subcontracts with Continental Airlines, a practice for which ALPA sued Eastern in another case. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990).

ness justification. *Fleetwood Trailer*, 389 U.S. at 379. The Eleventh Circuit did not, however, recognize that Eastern, as a carrier subject to the RLA, had a "duty to make all reasonable efforts to continue its operations during a strike . . . " *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 247 (1966). Eastern tried to recruit a sufficient number of replacements based upon the terms ultimately mandated by the Eleventh Circuit, but could not do so. It was certainly reasonable for Eastern to fulfill its duty to continue flying by reverting to its 25 year practice of offering permanent employment from the first day of training.

The Eleventh Circuit did not even consider whether this justification was sufficient. In light of the substantial risk that other airlines will have to shut down during future strikes given Eastern's proven inability to recruit sufficient replacements on the Eleventh Circuit's terms, this Court should set this matter for plenary consideration.

CONCLUSION

This case is critical to the airline and railroad industries. The Eleventh Circuit's decision itself states that the issue at stake has never been decided by this Court. App. 9a. The decision threatens the well-established rights of an employer to hire permanent replacements for strikers and to operate during a strike. Eastern's estate faces tens of millions of dollars in claims, and the decision endangers airlines in future strikes. This Court should review such a far-reaching and ill-advised decision.

For the foregoing reasons, Eastern Air Lines, Inc. respectfully requests that the Court grant this Petition.

Respectfully submitted,

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Dated: June 12, 1991

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5658

D.C. Docket No. 89-1630-Civ-EBD

EASTERN AIR LINES, INC.,

Plaintiff-Counterclaim
Defendant-Appellant,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,

Defendants-Counterclaim
Plaintiffs-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(December 20, 1990)

Before HATCHETT, and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this expedited case, we affirm the district court's ruling that Eastern Air Lines, Inc. (Eastern) is obligated

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

under the Railway Labor Act to reinstate returning pilot-strikers prior to awarding pilot positions to new hire pilots who, at the time the pilot-strikers unconditionally offered to return to work, had not successfully completed Eastern's training program and had not started flying regular revenue flights.

FACTS

On March 4, 1989, the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), which is the collective bargaining representative for mechanics and ground service employees at Eastern, initiated a strike against Eastern. On the same day, the Air Line Pilots Association, International (ALPA), which is the collective bargaining representative for Eastern's pilots, and the Eastern pilot group decided to honor the IAM's picket lines by engaging in a sympathy strike.

Shortly after the strike commenced, Eastern began hiring and training new pilots to fill vacant positions caused by the strike. For at least the first ten days of this hiring process, Eastern told prospective new hire pilots that they would become Eastern employees and assume permanent status upon completion of their training. Subsequently, Eastern informed new hire pilots that they would be considered permanent replacements for Eastern's striking pilots on the first day of training.

Eastern periodically entered the new recruits into the pilot training program which it administered under Federal Aviation Administration (FAA) guidelines. The training program lasted at least eight weeks (but in some cases took as long as four months), and included ground school instruction, oral and written examinations, and extensive use of sophisticated cockpit and flight simulators. *See generally* 14 C.F.R. §§ 121.403-09, 121.424, 121.433 (1990). New hire pilots were also required to complete between ten to twenty-five hours of operating experience on the

type of aircraft for which they had been trained. This operating experience, called Initial Operating Experience (IOE), must be performed on Eastern aircraft under the supervision of a "check pilot." *See* 14 C.F.R. § 121.434 (1990). Under FAA requirements, Eastern's pilot trainees must pass: (1) an FAA-administered examination after completing ground school; (2) an FAA-administered simulator test; and (3) an FAA-administered check ride at the conclusion of IOE. If the trainee successfully completes each of these requirements, the FAA issues a certificate which permits the trainee to fly regular revenue flights under Eastern's supervision and authority.

By early August of 1989, many of Eastern's striking pilots had made unconditional offers to return to work. On August 11, 1989, Eastern publicly stated that no pilot positions were available to former strikers. Instead, Eastern announced that strikers wishing to return to work would be placed on inactive status on a preferential recall list for future pilot positions as they became available. As of August 11, 1989, a significant number of new hire replacement pilots were still in training.

On November 22, 1989, the ALPA terminated the pilot strike and notified Eastern that all former strikers were immediately and unconditionally available to return to work. As of that date, at least 227 new hire replacement pilots remained in training.[1] From at least early August, 1989, until August 2, 1990, when the district court granted ALPA's motion for a preliminary injunction, Eastern filled vacant pilot positions by giving preference to its new hire pilots, rather than Eastern's striking pilots who had unconditionally offered to return to service.

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[1] Eastern maintains that 227 new-hire pilots remained in training as of November 22, 1989, while ALPA contends that at least 250 replacement pilots remained in training as of that date.

PROCEDURAL HISTORY

On August 11, 1989, Eastern filed this action against ALPA seeking a declaratory judgment under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, declaring that its "new hire pilots in training are permanent replacements who may not be deprived of active employment by strikers who have offered to return to work but have not yet been reinstated." ALPA counterclaimed requesting injunctive, declaratory, and monetary relief under the RLA. By its counterclaim, ALPA sought to vindicate its rights and the rights of former strikers against "Eastern's refusal to reinstate former strikers to Eastern pilot positions by treating non-employee 'trainees' as permanent replacements." Both Eastern and ALPA filed motions for summary judgment. ALPA also moved for preliminary injunctive relief under Count I of its counterclaims.

The district court entered summary judgment for ALPA and denied Eastern's request for summary judgment. Further, the district court granted ALPA's motion for preliminary injunctive relief under Count I of its counterclaims, (1) enjoining Eastern from treating its trainees as permanent replacements, or awarding trainees pilot positions ahead of former striking pilots who unconditionally returned to work, (2) ordering reinstatement for each former striking pilot prior to awarding pilot positions to new hire pilots who remained trainees as of November 22, 1989, and (3) enjoining displacement of striking pilots by new hire pilots who remained trainees as of November 22, 1989. ALPA's motion for preliminary injunctive relief defined trainees as "new hire pilot recruits who have not completed new hire pilot training—including Initial Operating Experience training flights and the receipt of a final Federal Aviation Administration . . . release to perform Eastern pilot services—and have not flown their initial, FAA-authorized Eastern revenue flight."

CONTENTIONS

Eastern contends that the district court erroneously ruled that the RLA requires it to displace its newly hired trainee pilots and reinstate former striking pilots to available Eastern pilot positions. According to Eastern, its new hire pilots who were still in training when the strike ended, were permanent employees. Consequently, Eastern argues that under striker replacement law, the returning strikers are not entitled to displace these permanent replacement pilots. Further, Eastern contends that the district court's preliminary injunction is impermissibly vague. Fed. R. Civ. P. 65(d).

ALPA contends that the district court properly granted summary judgment because Eastern violated the RLA by refusing to reinstate returning strikers prior to awarding pilot positions to pilot trainees. Pilot trainees are not "permanent replacements" under the RLA, ALPA argues, until they fully complete training and operate their post-IOE initial revenue flight. Moreover, ALPA contends that the district court's preliminary injunction satisfies the requirements of Fed. R. Civ. P. 65(d).

ISSUE

The sole issue in this case is whether the district court correctly determined that the RLA requires Eastern to reinstate former striking pilots prior to awarding pilot positions to new hire pilots in training.[2]

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[2] In its brief, Eastern contends that the issue is: "Whether a bankrupt airline such as Eastern may treat new hire pilots as permanent replacements for striking pilots from their first day of training. . . ." Eastern's status as a bankrupt airline is of little legal significance in determining whether it is obligated under the RLA to reinstate returning pilots.

DISCUSSION

A. Standard of Review

Our review of the district court's grant of summary judgment "is plenary, and we must apply the same legal standards used by the district court." *Fernandes v. Bankers National Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). "We will affirm the district court if, after construing the evidence in the light most favorable to the nonmoving party, we find that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *William Penn Life Ins. Co. of New York v. Sands*, 912 F.2d 1359, 1361 (11th Cir. 1990). Further, we review the district court's grant of a preliminary injunction only for an abuse of discretion. *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985).

B. The Railway Labor Act and Reinstatement Rights

Under the RLA, airline employees remain statutory employees of the carrier during a strike unless they secure other work. *See Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839, 842 (8th Cir. 1987) (*Trans World*), *rev'd on other grounds*, 103 L. Ed. 2d 456 (1989); *cf. NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-79 (1967) (*Fleetwood Trailer*). Consequently, an employer's refusal to reinstate former strikers after an economic strike constitutes an unfair labor practice unless the employer can prove that the failure to reinstate is based upon "legitimate and substantial business justifications." *See Fleetwood Trailer*, 389 U.S. at 378-79 (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)).

Where, for instance, an employer hires permanent replacement employees during an economic strike to continue operations, and refuses to discharge the permanent replacements in order to make room for returning strikers, the Supreme Court has found the employer's decision to

be supported by a legitimate and substantial business justification. *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) (*Mackay*); *Fleetwood Trailer*, 389 U.S. at 379 (an employer has "legitimate and substantial business justifications" for refusal to reinstate when "the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) (*Erie Resistor*) (under *Mackay*, "an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers."). Under these circumstances, the employer's legitimate interest in continuing operations is "deemed to outweigh the damage to concerted activities caused by permanently replacing strikers." *Erie Resistor*, 373 U.S. at 232. Although this exception, referred to as the *Mackay* exception, is firmly rooted in striker replacement doctrine, "[c]ourts have been reluctant to extend" it. *Trans World*, 819 F.2d at 846 (citing *Erie Resistor*, 373 U.S. at 232; *International Ass'n of Machinists and Aerospace Workers v. J.L. Clark Co.*, 471 F.2d 694, 698 (7th Cir. 1972)).[3]

C. District Court's Ruling

The district court began its analysis by noting that "[n]o authority binding on this court has directly addressed the

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[3] Though the courts have developed much of this striker-replacement doctrine in the context of the National Labor Relations Act (NLRA), the Supreme Court in Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 103 L. Ed. 2d 456, 465 (1989), observed "that carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA." The Supreme Court cautioned, however, that "the NLRA 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.' " *Trans World*, 103 L. Ed. 2d at 469 (quoting Trainmen v. Jacksonville Terminal, 394 U.S. 369, 383 (1969)).

issue of whether replacements still in training at the time a strike is called off may be accorded permanent replacement status." The district court defined trainees as "new hire pilots who were still in training, and who had not yet begun flying regular revenue flights . . . when the ALPA pilots made unconditional offers to return to work."

In the absence of binding authority, the district court followed *Trans World*, 819 F.2d at 845-47, *cert. denied in rel. part*, 485 U.S. 958 (1988), and *Air Line Pilots Ass'n. Intern. v. United Air Lines, Inc.*, 302 F.2d 886 (7th Cir. 1986) (*United Air Lines*), *cert. denied*, 480 U.S. 946 (1987), and held that "[t]o the extent that the pilot trainees in the instant case had not performed the work ordinarily discharged by the striking pilots, the trainees were not employees protected by the RLA." Further, the district court found that although Eastern "had a legitimate and substantial business justification to replace striking pilots with replacement pilots who could promptly assume the requisite duties and responsibilities of striking pilots, the same does not hold true with regard to trainees." Based upon these findings, the district court concluded that "the *Mackay* balance weighs in favor of reinstating the striking pilots in place of the trainees."

In this court, Eastern argues that, contrary to the district court's conclusion, its trainee pilots are permanent replacement employees, and that it is not, therefore, obligated to reinstate returning strikers. According to Eastern, this case is controlled by *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969) (*National I*), *appeal after remand*, 430 F.2d 957 (5th Cir. 1970) (*National II*), *cert. denied*, 400 U.S. 992 (1971). In response, ALPA argues (1) that returning pilots are entitled to displace pilot trainees because the trainees are not yet "permanent employees" under the RLA, (2) that *National I* and *National II* are consistent with the district court's holding, and (3) that this court should follow the Eighth Circuit's holding in

Trans World, and the Seventh Circuit's decision in *United Air Lines*.

D. Analysis

In this case, it is undisputed that replacement pilots who had begun flying regular revenue flights before Eastern's striking pilots made their unconditional offers to return to work, may be accorded permanent replacement status under the *Mackay* exception, and are not to be displaced to create positions for returning strikers. At issue is whether Eastern is obligated, under the RLA, to reinstate returning pilots prior to awarding pilot positions to new hire pilots in training who had not (1) completed Eastern's training program and IOE, (2) obtained an FAA certificate, and (3) begun flying regular revenue flights under Eastern's supervision and authority.

We note at the outset that neither the Supreme Court nor this court has specifically addressed whether the RLA requires an employer to reinstate returning strikers before awarding permanent positions to new hire trainees, such as the trainee pilots involved in this case. The answer to this question turns on whether Eastern's trainees were "permanent replacements."[4]

1. Trainees, *Trans World*, and *United Air Lines*

The narrow *Mackay* exception does not apply in this case because Eastern's trainee pilots did not attain the status of permanent replacement employees. The RLA defines an "employee" as:

> every person in the service of a carrier (subject to its continuing authority to supervise and direct

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[4] Because the Supreme Court in *Mackay* and *Fleetwood Trailer* struck the balance when it held that a legitimate and substantial business justification supports an employer's decision to displace strikers with permanent replacements in order to continue operations, we do not consider the balance anew.

> the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect . . . .

45 U.S.C. § 151, Fifth. Further, 45 U.S.C. § 181 limits "employee" status and the scope of RLA protection to "every air pilot or other person who *performs any work as an employee* or subordinate official of [a] carrier or carriers, *subject to its or their continuing authority to supervise and direct the manner of rendition of his service.*" (Emphasis added.).

In *Trans World*, the Eighth Circuit applied 45 U.S.C. § 181 and held that, under the RLA, a carrier's new hire trainees who had not completed their training prior to the end of a strike were not permanent employees, and were subject to displacement by returning strikers. *See Trans World*, 819 F.2d at 845-46. The facts of *Trans World* are indistinguishable from those in this case. In *Trans World*, the carrier hired and trained large numbers of would-be permanent replacement employees to continue operations during a flight attendant strike. At the conclusion of the strike, approximately 463 of the new hires had not completed flight attendant training.

After the strike, the carrier gave the trainees permanent replacement status and job placement preference over returning strikers. As in this case, Trans World argued that its trainees constituted permanent replacements under the RLA because the carrier had told the trainees that they were permanent employees, and paid them a salary. The Eighth Circuit rejected the carrier's argument finding that "those flight attendants holding a trainee status at the end of the strike may not be retained over striking employees." *Trans World*, 819 F.2d at 842. As the court explained:

> The trainees in question, although hired by TWA, never performed any services for TWA under its supervision prior to the Union's offer to return to work. Thus, they cannot be considered employees within the meaning of the RLA.

Trans World, 819 F.2d at 845-46. The *Trans World* court thus held that carriers cannot refuse to reinstate strikers by treating trainees as permanent replacements, and that carriers cannot reserve job positions for trainees once strikers unconditionally offer to return to work. *Trans World*, 819 F.2d at 845-47; *see also Railway Labor Executives' Ass'n v. Wheeling Acquisition Corp.*, 736 F. Supp. 1397, 1403 (E.D. Va. 1990) ("RLA rights are conferred only on 'employees' of a 'carrier' who currently perform work for that carrier.")

Similarly, in *United Air Lines*, the Seventh Circuit held that "unless a person has performed services for the employer under that employer's supervision he is not an employee for purposes of the RLA." *United Air Lines*, 802 F.2d at 913. In *United Air Lines*, the carrier recruited and began training some 500 pilots (the Group of 500) prior to the commencement of a pilot strike. United Air Lines offered 375 of these recruits, who had successfully completed their training, employment beginning on May 17, 1985, the day ALPA went on strike. All but a few of the Group of 500 honored ALPA's picket lines. In response, United Air Lines stated that it would not hire any member of the Group of 500 who had failed to report to work, except for cases involving personal hardship or other extenuating circumstances.

ALPA filed suit alleging that United Air Lines's actions with respect to the Group of 500 violated the RLA. The district court found for the Group of 500 concluding that they had become employees on May 17, 1985, the day the strike began, and that United Air Lines's treatment of these pilots after that date violated the RLA, 45 U.S.C.

§ 152, Fourth. The Seventh Circuit reversed holding that the Group of 500 were not "employees" under the RLA entitled to the protections of 45 U.S.C. § 152, Fourth. *United Air Lines*, 802 F.2d at 911 n.17. The Seventh Circuit opined:

> These pilots never performed any work for United nor did they ever submit to United's supervision of them in their work. By its own terms, the definition of employee under the RLA would exclude our giving the Group of 500 employee status.

United Air Lines, 802 F.2d at 911. The court went on to state that "trainees . . . simply do not fall within the RLA's definition of employee." *United Air Lines*, 802 F.2d at 913.

2. Eastern's Trainees

Based upon the persuasive reasoning in *Trans World* and *United Air Lines*, we hold that Eastern's new hire trainee pilots did not obtain the status of "permanent employees." First, the trainees were not qualified to perform the work Eastern's pilots ordinarily discharged. As previously stated, under FAA guidelines, Eastern's trainee pilots are required to complete a series of FAA examinations and obtain an FAA pilot certificate before operating on Eastern's regular revenue flights. To satisfy these requirements, Eastern enrolled its new-hire pilots in a training program which, in some cases, lasted as long as four months. Eastern's training program included ground school instruction, examinations, flight simulator training, and IOE.[5] Consequently, a trainee would only become qual-

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[5] We reject Eastern's contention that IOE is not part of the training/qualification process. *See, e.g., Trans World*, 819 F.2d at 841 n.2 (explaining that flight attendants are not qualified to perform revenue service until they complete IOE); Rosenbalm Aviation, 15 N.M.B. 313, 314-15 (1988) (holding that IOE is part of training mandated by the

ified to fly regular revenue flights for Eastern when the trainee successfully completes the training program, passes the FAA examinations, obtains an FAA pilot certificate and secures a release from the FAA.

Second, Eastern's trainees were not actually performing the work ordinarily discharged by the former strikers. As the district court correctly reasoned:

> Trainees, to be sure, are not qualified to perform in the stead of striking pilots. In fact, they may never be. Optimistically, they may ultimately fill the shoes of the striking employees. It would be presumptuous and premature, therefore, to afford trainees permanent replacement status which would otherwise permit Eastern to keep them in its employ notwithstanding the termination of the strike.

Eastern suggests that the distinction between trainees and returning strikers is an artificial one because the former strikers, like the trainees, must submit to training prior to again flying regular revenue flights. According to ALPA, "striking pilots can be requalified within a matter of days." Eastern maintains, however, that "having now been out of the cockpit for over 10 months, it would take a minimum of 10 days of training, to requalify a returning striker, provided that the pilot were returning to his or her prestrike category position," and assuming the pilot did not return to his or her prestrike category position, the process could take "up to 30 days." Our review of the record convinces us that the distinction between trainees and Eastern's returning pilots is real. First, the former strikers, unlike the trainees, have actually flown regular revenue flights for Eastern. Second, the returning pilots

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FAA, and that "[a]n individual may not serve as part of the cockpit crew in revenue service until he has successfully completed the training program."). As Eastern acknowledges, IOE is necessary to obtain FAA certification.

are only required to complete requalification training. Whether the duration of the requalification training is a "matter of days," ten days, or even thirty days, that period is substantially less than the time required to train and qualify the new hire pilots.

Despite the fact that Eastern's trainee pilots may never be qualified to fly regular revenue flights, Eastern argues that they are permanent employees because Eastern immediately placed the pilot trainees on its payroll, and gave them seniority numbers. We do not consider these unilateral actions to be dispositive of whether Eastern's trainees are permanent employees. As the Eighth Circuit concluded in *Trans World*:

> The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the payment of salary. Rather, RLA coverage is determined by the *work the person performs* under supervision of the employer. This performance factor is determinative in trainee situations because it is the only requirement that the statute explicitly includes. Thus, clear statutory language supports the conclusion that the trainees are not employees protected by the RLA because these trainees were not "performing any work" of the carrier by any stretch of the imagination.

Trans World, 819 F.2d at 846 (emphasis in original).

Further, Eastern urges this court to disregard the Eighth Circuit's decision in *Trans World* and the Seventh Circuit's holding in *United Air Lines* because, according to Eastern, a new hire recruit need not attain "employee" status under the RLA to be deemed a permanent replacement. We reject Eastern's urgings. Acceptance of Eastern's analysis would result in the creation of two classes of common carrier employees; "permanent employees" entitled to the benefits and privileges of the RLA and bound

by its duties and penalties, and a second class of "permanent employees" (the trainees) whose employer/employee relationship is not governed by the regulatory framework established by the RLA, and who are not extended the same benefits and obligations available to the other class of "permanent employees." No authority leads us to create such an anomalous situation.

3. *National I* and *National II*

Eastern argues that *National II* is controlling and requires that we hold that its trainees are permanent replacements. In *National I*, the Fifth Circuit held that the carrier had exceeded the permissible bounds of self-help by discharging employees who had engaged in an unlawful wildcat strike; the carrier "was entitled only to hire replacements for the strikers in order to operate its airline." 416 F.2d at 1007. In reversing the district court, the Fifth Circuit held that, under the RLA, the carrier could only refuse to reinstate former strikers if the strikers' jobs had been "filled" by permanent replacements "either at the time of the discharge or before the time the strike would have run its course." *National I*, 416 F.2d at 1007. The Fifth Circuit remanded the case to the district court to determine the number of positions "filled" by replacements. On remand, the district court held that the carrier had "hired" sixty-seven replacements as of the date that the strikers would have returned to work. *National Airlines, Inc. v. International Ass'n of Machinists*, 308 F. Supp. 179, 182 (S.D. Fla.), *rev'd*, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

The Fifth Circuit again reversed the district court, and remanded the case for a determination of the number of striking employees who had been "replaced" by new hire employees as of the date the strike would have ended. "In cases of replacement of a striker," the court concluded:

> the critical time is when the arrangements with the replacement worker become fixed and irrev-

> ocable. Thus, if an employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is "hired" even though subsequently he may be divested of the job for failure to pass medical or security clearance.

430 F.2d at 961 (citations omitted).

Although *National I* and *National II* are instructive, we do not agree with Eastern that these cases compel a reversal of the district court. First, in *National II*, the Fifth Circuit carefully noted that the critical time for determining when an employee is replaced is when the arrangements with the worker become "fixed and irrevocable." 430 F.2d at 961. In this case, although the new hires were on the payroll, as trainees their employment status could hardly be classified as "fixed and irrevocable" given that they could only fly regular revenue flights for Eastern *if* they successfully completed the training program and satisfied FAA requirements.

Second, *National II* did not, as does the present case, involve the employment status of trainees who could only work for the employer when they satisfactorily completed a lengthy training program and secured the requisite governmental releases and certificates. Nothing in *National II* permits carriers to refuse to reinstate former strikers by reserving available job positions for a significant period of time while a pool of unqualified trainees completes this process.

Third, we read the Fifth Circuit's dictum that a "replacement is 'hired' even though subsequently he may be divested of the job for failure to pass medical or security clearance" to mean that an employer can treat a new hire as a permanent replacement where, but for the failure to subsequently satisfy a technical qualification, the new hire would otherwise be considered a permanent employee. The prerequisites at issue in this case (i.e. satisfactory com-

pletion of Eastern's training program and compliance with the FAA's requirements) do not amount to technicalities which would allow Eastern, under *National II*'s reasoning, to treat a trainee as a permanent replacement prior to the trainee satisfying these job requirements. Consequently, we hold that the *Mackay* exception does not apply in this case because Eastern's trainees were not permanent replacements.

4. RLA Policy

Our conclusion, that Eastern is required to reinstate returning pilots prior to awarding pilot positions to new hire pilots, is consistent with RLA policy. Eastern's decision to refuse to reinstate returning pilots while reserving available pilot positions for unqualified trainee pilots, did not promote one of the declared purposes of the RLA which is to "avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. § 151a. As the district court reasoned:

> Hiring trained, qualified pilots is congruous with the undisputed purpose of the RLA: providing for uninterrupted transportation service, thereby maintaining the status quo. Enlisting a fleet of unqualified trainees for potential future hiring needs, however, satisfies a concern significantly more remote. To be sure, trainees cannot fly revenue raising flights until they have completed the training program. Their utility to the airline is contingent upon becoming qualified for the position. Thus, contracting with unqualified persons for future employment as pilots did not serve to fill the void left by the striking pilots, at least not until some later date.

Further, we agree with the Eighth Circuit's observation in *Trans World* that:

> to amass a trainee pool capable of replacing the entire striking workforce at some future date

> after the strike has ended . . . is inconsistent with the RLA's grant of protections to those persons who actually perform services for the employer.

819 F.2d at 846.

Moreover, Eastern's treatment of the returning pilots strikes a fundamental blow to the union and the collective bargaining process. *See Trans World*, 103 L. Ed. 2d at 471 ("we should hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself."). Not only does Eastern's decision to give preference to trainees over returning strikers discourage employees from exercising their rights to organize and to strike, it undermines one of the RLA's central goals: the preservation of the employer-employee relationship both during and after a strike. *See Fleetwood Trailer*, 389 U.S. at 378; *Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge No. 100*, 690 F.2d 838, 845 (11th Cir. 1982), *cert. dismissed*, 463 U.S. 1250 (1983).

5. Preliminary Injunction

Finally, we find that the district court's preliminary injunction is not impermissibly vague. Rule 65(d) of the Federal Rules of Civil Procedure simply requires "that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is prescribed." *See* C. Wright and A. Miller, 11 Federal Practice and Procedure § 2955 at 536-37 (1973 & Supp. 1990); *see also Williams v. City of Dothan, Ala.*, 818 F.2d 755, 761 (11th Cir. 1987) ("As this court has noted, Rule 65(d) should not be applied strictly; rather the inquiry should be whether the parties subject to the injunctive order understood their obligations under the order."). Here, the district court's order clearly requires Eastern to reinstate the number of former strikers necessary to fill those pilot positions unlawfully reserved for trainees at the end of the strike. Because the district court has yet to deter-

mine the specific number of Eastern pilot positions covered by the preliminary injunction and other issues, we remand the case to the district court.

CONCLUSION

For the foregoing reasons, we hold that the district court properly concluded that the RLA requires Eastern to reinstate returning strikers prior to awarding pilot positions to new hire pilots in training. We remand this case to the district court for further proceedings.

AFFIRMED and REMANDED FOR FURTHER PROCEEDINGS.

ANDERSON, Circuit Judge, dissenting:

Respectfully, I dissent. In my judgment, binding precedent in this circuit requires reversal. In a very similar context, the Former Fifth Circuit held that a newly-hired permanent employee is not displaced by a returning striker "even though subsequently he may be divested of the job for failure to pass medical or security clearance." *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 430 F.2d 957, 961 (5th Cir. 1970). I do not agree with the majority that the conditions of employment in *National Airlines*—i.e., medical or security clearance—can be dismissed as merely technical. In the airline industry, the medical condition and security clearance of workers is not technical.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-1630-CIV-DAVIS

EASTERN AIR LINES, INC.,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and EASTERN MASTER EXECUTIVE COUNCIL,

Defendants.

FILED
U.S. Dist. Ct.
S. D. Of Fla. Miami
August 2, 1990
ROBERT M. MARCH

O R D E R

THIS MATTER is before the court on the following Motions:

(1) AIR LINE PILOTS ASSOCIATION, INTERNATIONAL's ("ALPA") Motion for Preliminary Injunctive Relief under Count I of ALPA's Counterclaims;

(2) ALPA's Motion for Summary Judgment; and

(3) EASTERN AIR LINES, INC.'s Motion for Summary Judgment.

I. BACKGROUND

The facts material to the issue presently before the court are largely undisputed. On March 4, 1989, after fully exhausting the dispute resolution mechanisms of the Railway

Labor Act[1] ("RLA") the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") commenced a strike against Eastern Air Lines, Inc. ("EASTERN"). On that same day, the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL ("ALPA"), by vote of its Master Executive Council, honored the IAM's picket lines. In an action before this court, ALPA's strike was held to be a lawful sympathy strike. *Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Intern.*, 710 F. Supp. 1342 (S.D. Fla.), *aff'd*, No. 89-5229 (11th Cir. June 7, 1989).

During the ALPA strike, EASTERN hired new pilot recruits to fill pilot positions left vacant because of the strike. Under Federal Aviation Administration ("FAA") guidelines, trainee pilots must complete a series of FAA examinations, obtain an FAA pilot certificate, and secure a release from the FAA before operating EASTERN aircraft on regular revenue flights. Each new hire pilot, irrespective of level of experience, is required under these guidelines to complete training successfully before flying regular revenue flights. Under EASTERN's own regulations, pilot trainees and current pilot employees must undergo periodic training to familiarize themselves with specific EASTERN procedures and aircraft type. In order to meet the above requirements, EASTERN's new hire pilots were placed in a six to eight-week EASTERN training program. The program generally includes ground school instruction, flight simulator training, and the completion of training flights under the direction of EASTERN and/or FAA flight instructors.

By the middle of August 1989, several striking ALPA pilots had made individual unconditional offers to return to work for EASTERN. On or about August 11, 1989, EASTERN announced that EASTERN pilot positions were no longer available to former strikers and that former

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[1] 45 U.S.C. §§ 151-188 (1982).

strikers wishing to return to work would be placed on inactive status on a preferential recall list for future pilot positions that might become available. At this point, approximately 800 new hire replacement pilots were still in training. On November 22, 1989, ALPA informed EASTERN of its unconditional termination of the pilot strike and that all former strikers were immediately and unconditionally available to return to work. By this date, approximately 250 new hire replacement pilots remained in training. From at least early August to the present date, EASTERN has filled vacant pilot positions from the ranks of its new hire pilots rather than from the ALPA pilots who had unconditionally offered to return to service.

On August 11, 1989, EASTERN filed this declaratory judgment action. ALPA has counterclaimed for injunctive and declaratory relief. It is undisputed in this lawsuit that replacement pilots who had actually begun flying regular revenue flights before ALPA pilots made their unconditional offers to return to work may be accorded permanent replacement status, and need not be displaced to create positions for returning strikers. Thus, both parties agree that the only issue to be determined at this juncture is the reinstatement rights of the returning strikers vis-a-vis those new hire pilots who were still in training, and who had not yet begun flying regular revenue flights ("trainees") when the ALPA pilots made unconditional offers to return to work.

II. DISCUSSION

ALPA now moves for summary judgment as to EASTERN's claims and for a Preliminary Injunction under Count I of its Counterclaim. EASTERN has filed a Cross Motion for Summary Judgment on its Complaint for Declaratory Relief.

A. SUMMARY JUDGMENT STANDARD

A party seeking summary judgment bears the burden of demonstrating that there exists no genuine dispute as

to any material fact. Fed. R. Civ. P. 56(c) and (e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. *Mercantile Bank & Trust v. Fidelity Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). While the burden on a party seeking summary judgment is great, the opposing party has a duty to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 250. As stated at the outset, the facts in the instant dispute are largely undisputed, and both parties have filed Motions for Summary Judgment.

B. THE RAILWAY LABOR ACT

Within the jurisprudence of reinstatement rights under the National Labor Relations Act ("NLRA"), an employer's refusal to reinstate former strikers constitutes an unfair labor practice, unless the employer can show that his action is supported by a legitimate and substantial business justification. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). As first illustrated by the Supreme Court in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), one such justification arises when, in an economic strike, returning strikers' jobs have been filled by workers hired as permanent replacements during the strike in order for the employer to continue operations. *Fleetwood Trailer*, 389 U.S. at 379. In such cases, it is routinely held that an employer is not bound to discharge the permanent replacements in order to make room for returning strikers. *See, e.g., Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983); *Fleetwood Trailer*, 389 U.S. at 378; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963); *Mackay*, 304 U.S. at 345-47. In short, the employer's interest in continuing operations is "deemed to outweigh the damage to concerted activities caused by permanently replacing strikers." *Erie Resistor*, 373 U.S. at 232. While the burden of proving that the replacements were hired as permanent employees

falls squarely on the shoulders of the employer, *Fleetwood Trailer*, 389 U.S. at 378, the law allows for a considerable degree of contingency in the replacements' employment contract. *See Belknap*, 463 U.S. at 502-04.

Moreover, the issue of reinstatement rights has focused on the rights of the returning strikers, not on the rights or degree of protection afforded to the replacement workers.[2] Under *Belknap*, the rights of the replacement employees are enforceable even if antithetical to the rights of the returning strikers. A corollary follows: the rights of the replacement employees do not determine whether the employer has an obligation to reinstate past strikers.[3]

Although the principles discussed above arose under the National Labor Relations Act, courts have uniformly held that the general rule of *Mackay* applies with equal force in cases arising under the Railway Labor Act[4] ("RLA"). *See Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *National Airlines, Inc. v. International Ass'n of Machinists & Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969), *appeal after remand*, 430 F.2d 957 (5th Cir. 1970). In *Trans World Airlines, supra*, the Supreme Court recently approved the borrowing of precedent developed under the NLRA in order to aid the analysis of reinstatement rights under the RLA. The Court borrowed extensively from common law developed under the NLRA, but cautioned that because of the differing

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[2] As will be more fully developed in Part II.C., post, the inquiry as to whether the replacements are permanent is relevant not to determine the replacements' entitlement, but to determine the existence of a legitimate and substantial business justification.

[3] Again, the status of the replacements *is* relevant for the purpose of determining whether an employers' decision not to reinstate returning strikers is justified. *See supra* note 2. Here, as ALPA admits, EASTERN might be liable in contract to the replacements, irrespective of whether they are covered by the RLA.

[4] 45 U.S.C. §§ 151-188 (1982).

policies inherent in the two Acts, NLRA principles "cannot be imported wholesale into the railway labor arena." *Id.* at 1233 (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969)).

In the context of the RLA, the former Fifth Circuit,[5] after recognizing the common carrier's duty to make all reasonable efforts to continue its operations during a strike, held the hiring of permanent replacements to be consistent with the attempt to restore service. *National Airlines, Inc. v. International Ass'n for Machinists and Aerospace Workers*, 416 F.2d 998, 1006 (5th Cir. 1969) ("*National I*"). In its opinion after remand, the Fifth Circuit provided guidance in identifying replacement workers, noting as critical the time when arrangements with the replacement workers become fixed and irrevocable:

> Thus, if an employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is 'hired' even though subsequently he may be divested of the job for failure to pass medical or security clearance.

National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, 430 F.2d 957, 961 (5th Cir. 1970) ("*National II*"), *cert. denied*, 400 U.S. 992 (1971). The court went on to stress, however, that a mere offer and acceptance is not always enough. The court also found important "the necessity of actually coming on the payroll" and the commencement of actual employment. In remanding the issue to the district court for further factual determinations as to whether the strikers had been replaced, the court concluded that "[i]n the present case, the formation of an employment contract with a replacement,

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[5] The Eleventh Circuit adopted as binding all decisions of the former Fifth Circuit handed down by October 1, 1981. *Bonner* v. *City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

which never ripens into actual employment, may not displace the statutory right of the discharged employee to return to the status quo." *Id.* Thus, *National II* teaches that something more than an employment contract between the employer and replacement employee must exist before the striking employee's status is supplanted. Whether participating in a training program constitutes that "something more" is the question now before this court.

C. STRIKERS OR TRAINEES?

No authority binding on this court has directly addressed the issue of whether replacements still in training at the time a strike is called off may be accorded permanent replacement status. The United States Court of Appeals for the Eighth Circuit, however, has answered that question in the negative. *Independent Fed'n of Flight Attendants v. Trans World Airlines*, 819 F.2d 839 (8th Cir. 1987), *rev'd on other grounds*, 489 U.S. 426 (1989) ("*Flight Attendants*").[6] In *Flight Attendants*, the Eighth Circuit held that replacement personnel (flight attendants) who had not completed training prior to the end of an IFFA strike could not be accorded permanent replacement status under the RLA.[7] *Id.* In arriving at this conclusion, the court observed that "RLA coverage is determined by the work the person performs under supervision of the employer." *Id.* at 846; *accord Air Line Pilots Ass'n v. United Airlines*, 802 F.2d 886, 913 (7th Cir. 1986) ("unless a person has

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[6] The Supreme Court granted certiorari on an issue regarding the status of cross-over employees, but did not address the issue of replacement trainees. *Trans World Airlines v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989).

[7] The RLA provides coverage to "every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service." 45 U.S.C. § 181.

performed services for the employer under that employer's supervision he is not an employee for purposes of the RLA"), *cert. denied*, 480 U.S. 946 (1987).

To the extent that the pilot trainees in the instant case had not performed the work ordinarily discharged by the striking pilots, the trainees were not employees protected by the RLA. Trainees, to be sure, are not qualified to perform in the stead of the striking pilots. In fact, they may never be. Optimistically, they *may* ultimately fill the shoes of the striking employees. It would be presumptuous and premature, therefore, to afford trainees permanent replacement status which would otherwise permit EASTERN to keep them in its employ notwithstanding the termination of the strike. As the Eighth Circuit has remarked:

> [T]o amass a trainee pool capable of replacing the entire striking workforce at some future date after the strike has ended . . . is inconsistent with the RLA's grant of protections to those persons who actually perform services for the employer.

Flight Attendants, 819 F.2d at 846.

That EASTERN trainees do not enjoy permanent replacement status under RLA is consistent with the balancing analysis germane to NLRA disputes. *See Mackay*, 304 U.S. 333 (1938). The inquiry that has continuously controlled the issue of reinstatement rights under the *Mackay* rule is whether the failure to reinstate returning strikers is necessary for the continued operation of the business. If so, the action is deemed to be a legitimate and substantial business justification. *Fleetwood Trailer*, 389 U.S. at 378. The need to continue employer's operations is particularly salient here, in light of the RLA's concern for the continued operation of this country's vital network of transportation industries.

While this court agrees that EASTERN had a legitimate and substantial business justification to replace striking

pilots with replacement pilots who could promptly assume the requisite duties and responsibilities of striking pilots, the same does not hold true with regard to trainees. Hiring trained, qualified pilots is congruous with the undisputed purpose of the RLA: providing for uninterrupted transportation service, thereby maintaining the status quo. Enlisting a fleet of unqualified trainees for potential future hiring needs, however, satisfies a concern significantly more remote. To be sure, trainees cannot fly revenue raising flights until they have completed the training program. Their utility to the airline is contingent upon becoming qualified for the position.[8] Thus, contracting with unqualified persons for future employment as pilots did not serve to fill the void left by the striking pilots, at least not until some later date.

And, the inquiry now is whether Eastern has a legitimate *and substantial* business justification for preferring unprepared trainees over striking pilots who have returned to work. In this vein, the Supreme Court has held that:

> In *some situations*, "legitimate and substantial business justifications" for refusing to reinstate striking employees who engaged in an economic strike, have been recognized. One is when the jobs claimed by the strikers are *occupied* by workers hired as permanent replacements during the strike in order to continue operations.

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[8] Although the former Fifth Circuit stated in *National II*, 430 F.2d at 961, that included among those "hired" as permanent replacements, are persons "subsequently . . . divested of the job for failure to pass medical or security clearance," *ante* at 7, this court does not read that passage to mean that a trainee, unqualified for the position he is seeking, must be accorded permanent replacement status. Even if the court would accord such status to an otherwise qualified person when not able to meet medical or security clearance, that does not compel the same conclusion for a person inherently incapable of performing the job in question because of lack of skill and training.

Fleetwood Trailer, 389 U.S. at 379 (emphasis added). Thus, EASTERN has no legitimate business justification in choosing to employ trainees who have not yet occupied pilot positions, over unconditionally available, striking pilots, even if it has enforceable contractual obligations to the trainees. *Id.*; *cf. Belknap*, 463 U.S. at 512 (employer may be liable in contract to ousted replacement pilots, even though forced to reinstate strikers in an unfair labor practices dispute).

III. CONCLUSION

That the striking pilots are entitled to displace trainees does not necessarily imply that Eastern acted unreasonably in cultivating a sizable training pool of potential pilots to assuage a future crisis. But this court must balance competing interests: the rights of striking pilots to return to their jobs against management's efforts to maintain the status quo throughout the strike. After careful consideration, this court concludes that the *Mackay* balance weighs in favor of reinstating the striking pilots in place of the trainees. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

[1] that ALPA's Motion for Preliminary Injunctive Relief under Count I of ALPA's Counterclaims be GRANTED;

[2] that ALPA's Motion for Summary Judgment be GRANTED;

[3] that EASTERN AIR LINES, INC.'s Motion for Summary Judgment be DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of July, 1990.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: Counsel of record
rap/hms 073190

APPENDIX C

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5658

EASTERN AIR LINES, INC.,

Plaintiff-Counterclaim
Defendant-Appellant,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,

Defendants-Counterclaim
Plaintiffs-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCIUT
MARCH 15, 1991
MIGUEL J. CORTEZ
CLERK

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion December 20, 1990, 11th Cir., 19___, ___ F.2d ___).

Before: HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5658

D.C. Docket No. 89-1630-Civ-EBD

EASTERN AIR LINES, INC.,

Plaintiff-Counterclaim
Defendant-Appellant,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,

Defendants-Counterclaim
Plaintiffs-Appellees.

Appeal from the United States District Court or the Southern District of Florida

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Before HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ANDERSON, Circuit Judge, dissented and filed an opinion.

* Honorable Jessee E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED; and that this cause be and the same is hereby REMANDED to said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that plaintiff-counterclaim defendant-appellant pay defendants-counterclaim plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 20, 1991
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: March 26, 1991

APPENDIX E

(ATTACHMENTS OMITTED)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 89-1630-CIV-DAVIS

EASTERN AIR LINES, INC.,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and EASTERN AIR LINES MASTER EXECUTIVE COUNCIL

Defendants.

DECLARATION OF ALAN C. GIBSON

I, Alan C. Gibson, do hereby swear and affirm as follows:

1. I am Staff Vice President, Labor Relations at Eastern Air Lines, Inc. ("Eastern"), a position I assumed on August 11, 1987. In this position, I have day-to-day responsibility for the development, implementation and administration of all labor relations policies and collective bargaining agreements of Eastern, including those governing the employment of Eastern pilots represented by the Air Line Pilots Association, International ("ALPA"). With the exception of a five month period in 1966, I have been continuously employed by Eastern since 1964 in various positions concerning either the administration of labor relations policies governing the employment of Eastern pilots represented by ALPA, pilot crew scheduling or pilot

bidding and utilization. I offer this Declaration to provide factual information supporting Eastern's position that its new hire pilots in training are properly treated by Eastern as permanent replacements for the formerly striking pilots and, like all other Eastern pilots, properly hold a seniority date as of their first day of training at Eastern. I also offer this Declaration to clarify certain misrepresentations reflected in the Declaration of J. Randolph Babbitt ("Babbitt Dec.") submitted by ALPA in support of its motion for summary judgment and for preliminary injunctive relief.

I. BACKGROUND

2. ***ALPA's Offer To Return To Work***. At 5:30 p.m. EST on Wednesday, November 22, 1989, I received a telephone call from Charles Copeland, Master Executive Chairman for ALPA at Eastern. Mr. Copeland read aloud to me a letter which he stated was then being faxed to me. The letter stated that ALPA was terminating its strike against Eastern which had begun on March 4, 1989 and was making an unconditional offer to return to work on behalf of pilots still on strike.[1]

3. ***Pilot Employment As Of ALPA's Offer.*** Of the approximately 3500 active pilots at Eastern as of March 3, 1989, 214 never honored ALPA's strike, and 754 had participated in the strike for some time but had individually offered to return to work prior to ALPA's offer on November 22 ("crossover pilots"). Of the crossover pilots, 844 had been recalled to active service, with their full seniority, prior to ALPA's November 22 offer to return; 30 had been recalled but had not yet begun retraining as of that date; and 94 had not been recalled but remained on the preferential recall list as of that date. In addition

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[1] Mr. Copeland subsequently advised Eastern that individual striking pilots might want to continue to honor the picket line of the IAM, which continues on strike to this date.

to the 968 crossover pilots, during the ALPA strike Eastern hired 1223 new hire pilots, of whom 936 remain in Eastern's employment today. Of the new hires still at Eastern, 709 had completed their training and were in line service as pilots as of 5:30 p.m. on November 22, 1989; 227 new hires remained in training. Of those 227 new hire pilots in training on November 22, 19 remained in training as of January 12, 1990. Of the remaining, 183 completed training and are now at work in revenue service; 25 have left Eastern's employ.

4. ***Eastern Delayed New Hire Training To Accommodate Returning Strikers***. Following ALPA's strike on March 4, 1989, only 6% of Eastern's pilots elected to report for work, and Eastern was therefore forced to cancel all but a small portion of its schedule.[2] On March 6, 1989 Eastern's President, Phil Bakes, publicly pleaded with Eastern's pilots to return to work in order "to save Eastern and to save your jobs," and the jobs of thousands of other Eastern employees who were promptly furloughed due to the strike.[3] On March 6-8, 1989, Eastern unsuccessfully sought an injunction to compel ALPA to terminate pilot participation in the strike. Subsequently, on

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[2] From March 4 through June 8, Eastern was able to operate only its Eastern Shuttle, its South American routes, and a few other domestic routes, in total approximately 10% of its pre-strike schedule.

[3] On March 6, 1989 Eastern promulgated Return-To-Work procedures to govern the reinstatement of striking pilots to available positions. Attachment A. The Procedures clearly indicated that strikers were welcome to return to available positions, but that a returning striker could not displace a working pilot. The Procedures provided that strikers would be reinstated in the order in which they made offers to return to work, subject to qualifications. These Procedures have been consistently utilized to date. Since the start of the strike 874 returning strikers have been reinstated to active service in accord with these Procedures. Eastern has not considered positions to be available where it has made a commitment to a new hire pilot to fill the position, whether or not that new hire pilot has completed the training necessary for the position.

March 9, 1989, the economic consequences of the strike by its pilots forced Eastern to file for reorganization under Chapter 11 of the Bankruptcy Code.[4] Eastern quickly concluded that a successful reorganization would depend on the speed with which it would be able to return to the marketplace and attempt to recapture market share. That speed, however, was restricted by the number of pilots immediately available, complexities of pilot training and staffing, and the limitations of Eastern's pilot training facilities.[5] Accordingly, Eastern announced its intention to gradually rebuild its flight schedule and on March 21, 1989 began recruiting and advertising for new pilots to staff its operations as permanent replacements for the striking pilots. I was placed in charge of the initial phases of the new pilot hiring program.

5. Although in the early months of the ALPA strike there were few crossovers,[6] by June 1989, after it became

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[4] ALPA was fully aware that its actions might force Eastern into bankruptcy. In an ALPA videotape distributed to Eastern pilots three weeks prior to the strike, ALPA's financial advisor, Farrell Kupersmith, acknowledged that Eastern might go into bankruptcy if the pilots went on strike. Attachment B at 13. In a videotape distributed to employees three days prior to the strike, Eastern Chairman Frank Lorenzo stated that "Eastern does not have the financial resources to be able to withstand a strike." Attachment C at 2. On March 7, 1989, at a federal court hearing on Eastern's motion for a temporary restraining order preventing ALPA from striking, ALPA's counsel further confirmed that ALPA was aware of the consequences of its actions, asking rhetorically "Don't you think the Eastern pilots are aware that what they are doing might result in a Chapter 11 proceeding?" Attachment D at 100.

[5] Pilot training requires the extensive use of very sophisticated cockpit and flight simulators, and the availability of simulator time is a dominant factor in determining a carrier's maximum pilot training capability. Eastern maintains 9 simulators and can, if operating at its maximum capability, train approximately 130 pilots per month. Eastern's pilot training department has operated at its maximum capability since March 27, 1989 and continues to do so today. In an effort to increase its training capability during the strike Eastern unsuccessfully attempted to contract for simulator time with other carriers, a common industry practice.

[6] Between March 27 and July 30, 168 formerly striking pilots became

apparent that Eastern was continuing to operate, was successfully finding a more than adequate supply of qualified new hire applicants, and was proceeding to reorganize, the number of crossovers began to increase. By late July and early August 1989, ALPA's leadership and general membership were publicly debating the possibility of an offer to return to work. While the leadership and a majority of those who voted in a general membership vote ultimately rejected that option at that time, 307 striking pilots, apparently spurred by the debate, made offers to return to work between August 1 and August 11, 1989. In light of the sudden availability of so many crossovers, Eastern announced on that date that it was terminating its pilot hiring program and that it would not commence any additional new hire training classes (although a large number of qualified candidates had already been interviewed for such classes). An additional 279 striking pilots made individual offers to return to work after August 11 and prior to ALPA's offer on November 22. As of November 22 (and continuing as of the date of this Declaration), 874 crossover pilots had been recalled to work in accordance with Eastern's Recall-To-Work Procedures: 94 crossover pilots remain on the preferential recall list in the order in which they made their offers to return.

6. As a result of the availability of the additional 307 crossover pilots, Eastern "stretched out" the training of those new hire pilots already in class to make possible the more rapid recall and requalification training of the returning strikers, thus permitting a more rapid expansion of its flight schedule in the Fall months. If Eastern had not adjusted its pilot training schedule to accommodate and facilitate the return of the striking pilots, substantially all of the 227 new hire pilots at issue would have concluded

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crossovers. In accordance with Eastern's Return-To-Work Procedures, all were promptly recalled with full seniority, went through requalification training and returned to work.

their training prior to ALPA's offer to return on November 22, 1989. Thus, contrary to Mr. Babbitt's suggestion of hostile discrimination by Eastern against returning strikers, *see* Babbitt Dec. at ¶ 7, Eastern's voluntary decision to advance the requalification training of the crossovers actually made it possible for them to return to work faster than was otherwise required.

II. THE NATURE OF PILOT TRAINING AT EASTERN.

7. Every pilot hired by Eastern during the strike was already licensed by the Federal Aviation Administration as an airline transport pilot or commercial pilot with multiengine rating and instrument rating. In addition, each applicant had to possess the following minimum qualifications in order to receive further consideration for employment at Eastern: (i) 1,200 hours of fixed wing flight time, and (ii) 200 hours of pilot in command of multiengine aircraft (or military equivalent) flight time.[7] Thus, every pilot applicant offered employment by Eastern is already an FAA licensed and qualified pilot. Despite such qualifications, every pilot hired at Eastern has always been required to complete further training under Eastern's FAA-required and approved Pilot Training Program. This program provides Eastern-specific training to each new hire pilot, training them in Eastern's flight operations and flight crew management procedures and Eastern's specific cockpit equipment configurations for the type of aircraft to which they were assigned.[8] The FAA-approved training program

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[7] Since the commencement of ALPA's strike against Eastern on March 4, 1989, most of Eastern's new hire pilots have substantially exceeded these qualifications, frequently including years of experience as pilot in command for charter, supplemental and commuter carriers. Pilots hired since the beginning of ALPA's strike have possessed an average of approximately 5,700 hours of pilot flight time experience.

[8] While the aircraft and operating procedures of most major carriers are similar, each carrier has unique features in its equipment and procedure.

includes an Eastern-specific syllabus for pilot training for each pilot position (Captain, First Officer, Second Officer) on each type of aircraft in Eastern's fleet. New hire pilots are trained in basic Eastern operating procedures and then in the specific position and equipment to which they will be assigned. During training each pilot is subject to the supervision and control of Eastern Flight Operations management personnel.[9] Neither the basic structure nor the requirements of its Pilot Training Program were changed during the ALPA strike (due to facility constraints, however, pilot training was requiring at least eight weeks to complete, longer than prior to the strike).[10]

8. The Eastern-specific training which a new hire Eastern pilot receives would be of limited use to that pilot if he resigned from Eastern to join another major carrier with similar aircraft equipment, because the pilot would have to complete that carrier's training program.[11] Again, the training at issue here is not training to learn how to be a pilot; all of Eastern's new hire pilots are fully qualified and licensed FAA pilots with thousands of hours of flight experience. The training they are required to com-

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[9] Following his or her acceptance of an offer of employment as a pilot with Eastern, each new hire pilot is assigned by Eastern to report to a scheduled initial pilot training program. At the outset of the program, all pilots in training are advised of Eastern's rules and regulations regarding their conduct as Eastern employees generally and their attendance and performance in the training program. All such pilots in training have their entire training schedules set by Eastern, including the starting and ending time of classes, duration of breaks and location of accommodation during training.

[10] As stated, as a result of the August influx of a large number of crossover pilots, the training for new hire pilots was stretched out to accommodate the training of returning strikers, and in some cases has taken up to 4 months.

[11] Illustrative of this point is Eastern's experience in its 1973 merger with Caribair. Caribair pilots who were qualified as DC-9 Captains were nonetheless required to undergo full re-training as DC-9 Captains under the Eastern training syllabus.

plete is to familiarize them with Eastern procedures and equipment and is no different from the training required by veteran Eastern pilots when they change position or aircraft type. In fact, Eastern has an "up or out" policy, whereby veteran Eastern pilots must, to continue their employment at Eastern, eventually successfully complete the same training for a Captain position as required by Eastern's new hire pilots who have been trained for such positions.

9. Pursuant to FAA regulations, *see* 14 C.F.R. § 121.433 ("Training Required"), Eastern's Pilot Training Program includes ground school (technical classroom training complete with written examinations) and extensive use of sophisticated cockpit and flight simulators. Pursuant to a separate FAA regulation, *see* 14 C.F.R. § 121.435 ("Operating Experience"), following the completion of the Eastern Pilot Training Program, each pilot is required to fulfill anywhere from 10-25 hours of operating experience on the aircraft for which he has been trained. Such experience, referred to as Initial Operating Experience ("IOE"), is obtained by the new hire pilot or veteran Eastern pilot on assuming a crew member position on a revenue flight, under the supervision of a "check pilot," who observes the new hire's performance. A pilot's IOE does not take place until the pilot has completed all appropriate ground and flight training as prescribed by 14 C.F.R. § 121.433, and have been assigned as a regular pilot to a pilot domicile. Indeed, the only reference to a pilot's "initial on-line qualification" in the Eastern-ALPA agreement is found in Section 27(T) ("Assignment Of Flying At A Domicile") (Attachment E), not in Section 26 ("Training").[12]

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[12] Mr. Babbitt's statement that pilot training at Eastern includes IOE is a gross mischaracterization. Babbitt Dec. at ¶ 5. Initial operating experience is only necessary to obtain FAA certification, and is clearly *not* part of his Eastern provided training and is not included on any pilot training syllabus. Thus, at Eastern, a new hire pilot's IOE occurs

III. PILOTS IN TRAINING AT EASTERN HAVE ALWAYS BEEN RECOGNIZED IN ALL RESPECTS AS EMPLOYEES IN THE SERVICE OF EASTERN

10. Mr. Babbitt's Declaration acknowledges that new hire pilots in initial training have always been awarded pilot seniority numbers and accrued seniority from their first day of training. Babbitt Dec. ¶ 9. Incredibly, Mr. Babbitt nonetheless erroneously asserts that such pilots are not treated as Eastern employees under the Eastern-ALPA contract or past practice. This assertion is belied not only by the award of a seniority number but also by the fact that new hire pilots have always been treated as in the "service" of Eastern and have received pay, and accrued seniority, vacation, sick leave and service credit for pension purposes under the Eastern-ALPA contract from their first day of training, which is considered to be their "date of hire."[13]

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after the pilot completes training and reports to his or her assigned domicile and is accomplished while the pilot is flying in revenue service.

[13] Mr. Babbitt's assertions are also belied by positions taken by ALPA in grievance proceedings conducted pursuant to the Eastern-ALPA agreement. For example, in the grievances of Robert S. Braunstein and Kenneth Nease, which were heard together on June 25, 1987, ALPA's representative, Mr. John Loomos, took the position that the Eastern-ALPA agreement governed new hire pilots while in training. "Section 26 of the Agreement . . . protects the pilot from having to pay for any training that he receives while he is in the employ of Eastern; that would be training which is necessary for him to obtain or maintain his qualifications to function as an Eastern pilot." Attachment G at 7-8. During that same hearing, Mr. Loomos stated that "[a pilot's] name goes on the seniority roster at the date you are hired. We all know the rates of pay and working conditions of these pilots or any pilot hired by Eastern is governed by the Agreement (between Eastern and ALPA)." *Id.* at 26. Likewise, in a grievance filed on June 7, 1989, ALPA represented one of the pilot's hired as a permanent replacement during the strike who had been terminated by Eastern prior to the completion of his initial training. Attachment H. Thus, Mr. Babbitt's assertions that new hire pilots in training are not represented by ALPA and are not covered by the Eastern-ALPA agreement are contradictory to positions previously adopted by ALPA.

11. ***New Hire Pilots In Training At Eastern Have Always Been Placed On The Payroll On Their First Day In Training.*** Section 3-B of the Eastern-ALPA Agreement, "Longevity Pay Rates" (attached hereto as Attachment F, as amended February 23, 1986) provides as follows:

> Pilots in their first year of accredited service with Eastern as a pilot shall be paid only a monthly salary calculated in accordance with the following table:
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> | | |
> |---|---|
> | 1st six months | $1,450.00 |
> | 2nd six months | $1,600.00[14] |

During my entire 25 years of service at Eastern, new hire pilots arriving at Eastern have been placed on the payroll pursuant to this provision, or its predecessors, on their first day of training at Eastern,[15] which is usually six to eight weeks prior to their first flight as a pilot in revenue service for Eastern. Thus, initial training has consistently been recognized and treated by both Eastern and ALPA as in the "service" of Eastern. All pilots hired by Eastern since March 4, 1989 have been placed on the payroll on their first day of training in accordance with this practice.[16] To illustrate the past application of this provision, I enclose as Attachment I copies of training and personnel records for four pilots which show that historically a new

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[14] In an effort to attract qualified new hire pilots during the strike, Eastern has such pilots salaries somewhat higher than those specified in the agreement.

[15] On their first of training new hire pilots are issued an employee identification number and an identification card which is identical to those of all Eastern employees.

[16] Eastern begins deducting all applicable taxes (*i.e.*, federal and state withholding and social security taxes) and begins paying unemployment insurance commencing with a new hire pilot's first day of training. New hire pilots also become eligible for employee passes on their first day of training.

hire pilot's date of employment for the purpose of semi-annual pay increases required by the Eastern-ALPA agreement, *i.e.*, "pay progression date," is also the first day the pilot reports to training.

12. ***New Hire Pilots In Training At Eastern Have Always Been Placed On The Seniority List And Have Accrued Seniority From Their First Day of Training.*** Section 18-B of the Eastern-ALPA Agreement, attached hereto as Attachment J, provides:

> Except as provided in Section 19 of this Agreement, seniority shall begin to accrue from the date a pilot is first placed on the payroll on regular pilot status, at which time he will be given a concurrent seniority number and from which date seniority shall continue to accrue during his period of service.

Pursuant to this provision, during my entire tenure at Eastern, new hire pilots always have been placed on the Eastern pilot seniority list as of their first day of training.[17] This practice has continued unchanged as to all pilots hired by Eastern since March 4, 1989. To illustrate the past application of this provision, I enclose as Attachment K, two separate intercompany memoranda which record the assignment of seniority dates and numbers to new hire pilots in training, always as of their first day of training. The ALPA MEC Chairman at that time (L.D. Schulte or J.J. Bavis) is shown as a recipient of each memorandum.

13. ***Under the Eastern-ALPA Agreement, A Pilot's "Service" At Eastern Commences From The First Day Of Training.*** In my twenty-five year experience at Eastern, the "date of hire" of a pilot has always been considered by both Eastern and ALPA to be the date he reports

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[17] In fact, a new hire pilot's relative seniority within his training class will be used to award him or her initial domicile assignment, subject only to the positions available at the time.

for training; "service" as a pilot has always been calculated to run from that date of hire for all purposes. For example, pursuant to Documents 90 ("A Plan") and 91 ("B Plan") (*see* Attachments L and M) a pilot's date of hire controls accrual of service credits under both of Eastern's pilot pension plans. To illustrate, Attachment N, Eastern pension information reports and training records on three individual pilots, demonstrates that the original employment date and active service date for pension calculation purposes are calculated from the first day of training. Pursuant to Section 16(A)(1) of the Agreement ("Vacations") (Attachment 0), a "newly employed pilot" accrues vacation days commencing with his or her first day of training. Pursuant to Section 38 ("Sick Leave") (Attachment P), pilots also accrue sick leave "for each month of service" which commences with the first day of training. Similarly, under Document 12, Paragraph 13 of the Eastern-ALPA Agreement (Attachment Q), a pilot becomes eligible for participation in Eastern's medical insurance plan after having "attained sixty (60) days of company active service," which service commences on the first day of training. For at least the past 25 years, with the knowledge and approval of ALPA, Eastern has treated all new hire pilots in initial training as in the service of Eastern for purposes of vacation accrual, sick leave accrual, pension service credit and eligibility for medical insurance. Thus, Mr. Babbitt's assertion that a new hire pilot in training is not covered by the Eastern-ALPA agreement is belied by the overwhelming practice of the parties. The fact that trainees do not pay union dues is not relevant because pilots are not required to pay union dues during the period they are probationary pilots.

IV. EASTERN HAS PROMISED ITS NEW HIRE PILOTS THAT THEY WOULD BE PERMANENT REPLACEMENTS AS OF THEIR FIRST DAY OF TRAINING.

14. Eastern began advertising and recruiting for new pilots on March 21, 1989, planning to start its first new

hire training class on March 27, 1989. All recruiting materials noted the existence of a labor dispute and stated that new pilots, once hired, would be permanent replacements for striking pilots; *i.e.*,that they would not be subject to displacement in favor of returning strikers.[18]

15. ***ALPA Proclaimed That Eastern Would Not Be Able To Recruit Sufficient Qualified Pilots.*** One of ALPA's propaganda themes to convince its members to remain on strike was that, unlike the circumstances during the ALPA strike against Continental Airlines in 1983, there were no longer sufficient qualified pilots available for Eastern to be able to replace them. *See* Attachment S. Indeed, during a conversation I had with Mr. Babbitt, in July 1989, he stated that ALPA had not expected that Eastern would be able to recruit sufficient qualified pilots to replace those on strike.

16. ***ALPA's Campaign To Discourage New Hire Pilots From Accepting Employment With Eastern.*** ALPA's response to Eastern's bankruptcy and announced intent to hire new pilots was prompt and hostile. ALPA publicly supported the sale of Eastern to third parties and publicly stated that it would not negotiate with, or return to work for, current Eastern management. *See* Attachment T. While ALPA proclaimed that Eastern could not hire sufficient pilots to operate, it nonetheless promptly launched a campaign to discourage potential applicants from even considering employment at Eastern. ALPA created and

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[18] Eastern was aware that commitments of permanent replacement status to new hire pilots could become an obstacle to an early settlement of the strike. Accordingly, still hopeful that striking pilots would return in large numbers before their replacements finished training, Eastern initially elected to make a change from its past practice described in ¶¶ 10-13, *supra*, and advised its initial recruits that they would become Eastern employees and attain permanent replacement status as pilots upon *completion* of their training, rather than upon its commencement, as in the past. A copy of Eastern's initial March 1989 "Fact Sheet" for pilot recruits is Attachment R.

distributed at least three special information packages for prospective pilot applicants which are enclosed as Attachments U, V, and W. These packages reflect the hostile comments and themes which ALPA had already begun to utilize by word of mouth among pilots to discourage applications at Eastern. Among the statements circulated by ALPA were the following:

> Eastern is attempting to hire SCABS .... Understand this: *the day you sign your name* in any way to a document at Eastern Air Lines you have committed suicide in your airline career... All new hires will be *furloughed before they ever get started* and will be in every airline's computer as a SCAB and forever unhireable.
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> Att. U, at p. 2 (emphasis added)
>
> Why are you not an Eastern employee until successful completion of training? ... Is the training program a numbers game to show the bankruptcy judge?
>
> Att. U, at p. 20
>
> According to ALPA, new pilots will be considered strike-breaking pilots whenever they report for *any* flight operations function—including recurrent or initial training if a strike is in progress.
>
> * * *
>
> Traditionally, flying a revenue trip has been the confirmation of strike-breaking status. However, ALPA now says that once a strike has begun, presence on the property for training of any kind will place pilots in a strike-breaking status.
>
> Att. V, Part 2 at page 6.

> ALPA—[you will be considered] a strike-breaker by all airline pilots *the day you start training.* A SCAB, like a tattoo, is forever.
>
> Att. W, at p. 12 (emphasis added)

17. ***The Results Of ALPA's Campaign.*** As of March 24 it was clear to Eastern's pilot recruiters that many qualified pilot candidates were available and interested but hesitant—largely because of ALPA's hostile rhetoric and threats by ALPA representatives that new hire pilots would be displaced promptly at the conclusion of the strike since they would not be considered employees until successfully completing training. While many highly experienced pilots who formerly flew for charter or freight or commuter carriers expressed interest, they also expressed a reluctance to terminate their current employment without firmer assurances from Eastern. Accordingly, Eastern decided to advise all applicants that it was offering employment and permanent replacement status, effective from the first day of pilot training, thus returning to Eastern's longstanding policy and practice. On March 27, 1989, I caused the recruiting literature to be revised accordingly. A copy of the revised "Fact Sheet" for pilot recruits is enclosed as Attachment X.

18. ***Eastern's Promises To The New Hire Pilots.*** All of Eastern's new hire pilot trainee classes have been repeatedly assured by senior management officials, including Mr. Bakes (President of Eastern), Mr. Matthews (Senior Vice President Human Resources), and Captain Frank Causey (Eastern's Vice President for Flight Operations during the period when all of the new hire training classes commenced) that they would be given seniority numbers and treated as permanent replacement employees from their first day of training. I firmly believe that such assurances have been absolutely essential to Eastern's recruiting and have helped to avoid any massive attrition from the train-

ing program in response to ALPA's threats and efforts at intimidation.[19]

V. ALPA's Threats Against Working Pilots.

19. Mr. Babbitt's suggestion that ALPA seeks to vindicate the rights of crossover pilots in this litigation is disingenuous. Babbitt Dec. ¶ 6. ALPA has made no secret of its contempt for pilots who crossed the picket line and returned to work, and has leveled a barrage of unflattering remarks at such pilots, calling them such names as "scabs," "crawl backs," and "scum." Attachment Y. In fact, ALPA has actively sought to discipline members who abandoned the strike, relying on reports from the then striking pilots in the field to compile a list of suspected strikebreakers for review by ALPA's Article 8 Committee, the group responsible for coordinating the punishment of strikebreakers for violation of ALPA's Constitution and Bylaws. ALPA also urged its members to draft and sign sworn statements that they had witnessed those pilots who dishonored the strike:

> [T]he Article 8 proceedings against scabs are ongoing in the Atlanta Base. We need signed statements from pilots who have made contact with scabs, talked to the scabs and seen the scabs at work. This is your chance to push people who have jeopardized your career in their own jeopardy. Please return any statements to us early next week.

Attachment Z; *see also* Attachments AA and BB. Thus, ALPA made it clear that pilots who returned to work for

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[19] During the course of their training program, Eastern's new hire pilots have been housed at various hotels in Miami. From the date our first trainee class arrived, striking ALPA pilots have been stationed at these hotels almost continuously. The striking pilots' apparent mission was to talk the trainees out of their interest in Eastern, whether by cajolery or coercion.

Eastern by signing the preferential recall list immediately became "scabs" subject to union discipline:

> [P]ilots who have called or gone in to have their names put on a recall list will be removed from the list of those eligible to draw strike benefit checks . . . [and] are considered to be scabs. . . . [T]he act of signing up for recall subjects every pilot doing so to the filing of Article 8 charges and the implementation of a minimum $10,000.00 fine, even if the individual has resigned from ALPA.

Attachment CC; *see also* Attachment DD. Indeed, as already found by the United States Bankruptcy Court for the Southern District of New York, ALPA repeatedly manifested its hostility to the veteran Eastern pilots who elected to work during the strike:

> ALPA's assertion that it has commenced the lawsuit [seeking to enjoin Eastern's lease of aircraft with crews from another company for the purpose of performing Eastern flying during the strike] on behalf of and to benefit its employees who desire to return to work with Eastern is disingenuous and in contradiction to ALPA's avowed strike policies which are calculated to discourage any of its members from returning to work for Eastern. Returnees are treated by ALPA with the utmost contempt and subject to disincentive sanctions.

Findings of Fact and Conclusions of Law, *Eastern Air Lines, Inc. v. Air Line Pilots Association International (In re Ionosphere Clubs, Inc.)*, Adversary Proc. No. 89-6143A (Bankr. S.D.N.Y. entered October 4, 1989) at 8 ¶ 27 (Attachment EE hereto).

VI. EASTERN'S STATUTORY RIGHT TO SELF HELP WOULD BE MEANINGLESS IF IT CANNOT TREAT NEW HIRE PILOTS AS PERMANENT REPLACEMENTS FROM THEIR FIRST DAY OF TRAINING

20. As discussed in ¶ 16, ALPA's campaign to undermine Eastern's pilot recruiting program focused heavily on the lack of job security at Eastern and the fact that trainees would be "at risk." In my view, and as attested by the Declarations of 49 new hire pilots, Eastern would have been unable to attract the number of qualified pilots who have applied and been hired to fill pilot positions without a promise of permanent replacement status from the first day of training. This is particularly true in light of the high experience level of those pilots. A number of these pilots had established themselves with substantial seniority at smaller air carriers (charters, freight and commuter carriers) or as corporate pilots, but were frequently regarded as "too old" to be hired in junior position at major carriers, where they would have to spend many years to gain sufficient seniority to fly as Captain. Not knowing when the ALPA strike might end, many such pilots inquired extensively to assure themselves that they would be guaranteed permanent replacement status from their first day of training and would not be "at risk" at any time at Eastern once they had sold their businesses or resigned their prior position, given up years of seniority, and in some cases relocated themselves and their families. Thus, in the absence of a promise of permanent replacement status from the first day of training, Eastern's statutory right to use permanent replacements to continue operation would be rendered meaningless.

21. The reliability of Eastern's promise of permanent replacement status to all of its new hire pilots is also crucial to Eastern's ability to conduct future negotiations with ALPA. At some point two or three or five years from now, Eastern will again face negotiations with ALPA on the next contract. During those negotiations, ALPA

will surely threaten a strike if its demands are not met; Eastern will be at a severe disadvantage if it is not equally able to assert an intent to operate and to hire replacement pilots if necessary. I believe that if Eastern dishonors its promises to its new hire pilots in this dispute, it will be unable to recruit and hire replacement pilots during any future strike. ALPA would surely make all potential applicants aware of the unreliability of Eastern's promises. Eastern's theoretical right to operate would be an empty threat and Eastern would then be at ALPA's mercy to either capitulate at the bargaining table or to cease operations for the duration of any strike. Thus, failure to honor its commitments this time would totally emasculate Eastern in future collective bargaining with any of its labor unions. Eastern's ability to conduct future negotiations effectively thus compels it to honor its present commitments of permanent replacement status to new hire pilots from their first day of training.

VII. IRREPARABLE INJURY

22. Mr. Babbitt's Declaration wrongly asserts that "striking pilots can be requalified within a matter of days." Babbitt Dec. at ¶ 11. In fact, having now been out of the cockpit for over 10 months, it would take a minimum of 10 days of training, to requalify a returning striker, provided that the pilot were returning to his or her prestrike category position. However, the pilot vacancies for which the pilots in training, as of November 22, were being trained were among the most junior pilot positions available, including 105 B-727 second officers and 40 DC-9 first officers. These were not the prestrike category positions of either the 227 most senior strikers nor the 94 unrecalled crossover pilots whose names remained on the preferential recall list as of ALPA's November 22 offer. Accordingly, upon recall such senior returning strikers would require full retraining, a process requiring up to 30 days and costing Eastern (depending upon whether the pilot requires requalification, transition or upgrade training) any where

from $9000–$35,000 per pilot,[20] and, due to the ongoing training of working pilots, it would take months to complete the retraining of over 220 returning pilots. Most importantly, if this Court orders Eastern to displace the 227 pilots who were still in training on November 22, Eastern will be forced to cancel hundreds of flights, thus causing great inconvenience to the travelling public, and costing Eastern millions of dollars in lost revenue, which it desperately needs, and significant amounts of goodwill at a time when it is struggling to recapture marketshare and to reorganize. Eastern will be forced to cancel flights because, as stated above, most of the returning strikers affected by such an order will require up to 30 days of training before they can resume line flying. However, it is my firm conviction that a significant number of the affected new hire pilots, knowing that they will be furloughed by Eastern, will resign their employment with Eastern before the returning strikers can be trained.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 16th day of January 1990.

/s/ Alan C. Gibson
Alan C. Gibson

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[20] Moreover, at the time of the next annual bid, which the Eastern-ALPA agreement provides must be effective between June 1 and August 1 of each year, these senior returning pilots will be able to assert their seniority to obtain a higher permanent category positions, necessitating additional training for them and, due to the "ripple effect" of such pilot staffing changes, the retraining of hundreds of other pilots as well.

APPENDIX F

(ATTACHMENTS OMITTED)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 89-1630-CIV-DAVIS

EASTERN AIR LINES, INC.,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES MASTER EXECUTIVE COUNCIL

Defendants.

DECLARATION OF KAREN AVERILL

I, Karen Averill, do hereby swear and affirm as follows:

1. I served as the coordinator of pilot recruiting at Eastern Air Lines, Inc. ("Eastern") from March 14, 1989 until August 11, 1989, when Eastern announced that it was terminating its pilot hiring program in light of the large influx of crossover pilots during the previous few weeks. While the pilot hiring program was ongoing, I was responsible for the overall administration of the process by which Eastern recruited, screened, and interviewed applicants for pilot positions at Eastern. Prior to March 14, 1989, I was employed by Eastern for approximately three years as a professional recruiter for prospective employees in all job categories.

2. On March 21, 1989, two and a half weeks after ALPA commenced its strike against Eastern, Eastern began to

advertise that it was hiring pilots to replace its striking pilots. The advertisements clearly stated that Eastern was offering full-time, permanent positions to new hire pilots. A copy of Eastern's standard pilot recruiting advertisement is enclosed as Attachment A; a list of the newspapers and dates on which this ad was run is enclosed as Attachment B.

3. Between March 21 and August 11, Eastern received more than two thousand employment applications from persons who fully satisfied, and indeed, in most instances, far exceeded Eastern's minimum qualifications for hire as a line pilot.[1] However, aware of the close scrutiny that the new hire pilots would receive, Eastern developed procedures to ensure that the pilots it hired would meet the highest standards. In general, once a person's employment application was received, a pilot recruiter would contact the applicant and conduct a telephone screening interview to determine whether the pilot satisfied Eastern's minimum qualifications. If the pilot recruiter determined that the pilot applicant satisfied Eastern's minimum qualifications, Eastern sent the applicant an information package, which contained an employment application, a fact sheet, and other information about Eastern, and scheduled a pre-hire interview with the applicant at the earliest available date (generally within a few days after the applicant received the information package).

4. The pre-hire interviewing process was rigorous, consisting first of a group briefing conducted by a pilot re-

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[1] Every pilot hired by Eastern during the strike was already licensed by the Federal Aviation Administration as an airline transport pilot or a commercial pilot with multiengine rating and instrument rating. In addition, each applicant had to possess the following minimum qualifications in order to receive further consideration for employment at Eastern: (i) 1,200 hours of fixed wing flight time, and (ii) 200 hours of pilot in command of multiengine aircraft (or military equivalent) flight time.

cruiter, followed, for the remainder of a full day, by a series of individual interviews to ascertain whether the applicant possesed the qualifications and proficiencies necessary to be hired as a pilot by Eastern. If the applicant was determined to be fully qualified, he was offered a permanent pilot position at the end of the interview process and, if the offer was accepted, a mutually agreeable date was established for the beginning of his initial training, which was, however, contingent upon the applicant's successful completion of a background check and a physical examination.

5. In the three years I have been employed by Eastern, a new hire pilot was always placed on the payroll and the Eastern pilot seniority list as a permanent Eastern employee beginning with his or her first day of training. However, for approximately 10 days following the commencement of ALPA's strike, Eastern initially told prospective new hire pilots that they would become Eastern employees and assume permanent replacement status as pilots only upon completion of their training.

6. Shortly after Eastern began to advertise for new pilots, ALPA initiated an aggressive effort to discourage potential applicants from applying for pilot positions at Eastern and to encourage those who had accepted pilot positions not to report for training or to leave Eastern. Among other things, ALPA emphasized that new hire pilots would not be considered permanent Eastern employees until they had completed training and threatened that, until such time, they could and would be displaced if ALPA elected to end its strike.

7. ALPA's efforts to discourage persons from applying for pilot positions at Eastern and from completing training once they had been hired (which are described more fully in the accompanying Declaration of Alan C. Gibson), created widespread concern and confusion on the part of actual and potential applicants as to the security of new hire

pilot positions at Eastern. Many qualified pilot applicants told me, and other pilot recruiters that, because of ALPA's intimidation, including threats by ALPA that new hire pilots in training were not permanent employees and would be displaced if ALPA elected to end its strike, they did not desire to pursue further their interest in a pilot position at Eastern. During those initial weeks of the pilot hiring program, approximately 100 pilot applicants, who had been sufficiently interested in Eastern (despite ALPA's strike) to apply for a pilot position, appear for a pre-hire interview and accept an offer of employment, subsequently failed to appear for their scheduled class date.

9. Consequently, to insure that it would continue to attract qualified pilot applicants, on March 27, 1989, Eastern revised its fact sheet and returned to its long established practice of offering permanent employee status to pilots effective their first day of training. Eastern then recontacted pilot applicants who had earlier decided not to pursue further their interest in a pilot position at Eastern (including those pilots who had failed to report for a scheduled class date), and informed them that new hire pilots would be considered permanent employees as of their first day of training. Many of these persons then decided to reschedule their training class dates.

10. It is my firm belief that Eastern's decision to return to its established practice effectively defused concern on the part of pilot applicants and trainees as to the permanent nature of their positions, and, in my view, made it possible for Eastern to attract qualified pilot applicants who, without a guarantee of a permanent employee status as of their first day of training, would not otherwise have decided to apply for and to accept employment at Eastern.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 16th day of January, 1990.

/s/ Karen Averill
Karen Averill

APPENDIX G

Railway Labor Act Provisions

45 U.S.C. § 151, Fifth provides as follows:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

45 U.S.C. § 181 provides as follows:

§ 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government,

and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.